Supreme Court, U.S.
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No. 97-168 JUL 23 1997

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IN THE

Supreme Court of the United States

October Term, 1996

WESLEY K. BELL, A Married Man,

Petitioner,

vs.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, COMMISSIONER OF ENVIRONMENTAL PROTECTION & TOWNSHIP OF STAFFORD, DALE LESSNE, PHILIP SANDINE, JOHN R. WEINGART, ANTHONY SCOPPETUOLO, ROBERT PEIL, JR., STEVEN WHITNEY, and KATHLEEN M. CANN, Individually and in his/her official capacity as an official of the Department of Environmental Protection,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the State of New Jersey, consistently with the First and Fourteenth Amendments to the United States Constitution, do the following?

A. Regulate private property through its Wetlands Act to prevent a property owner from his use of the property by erecting Billboards thereon which have (been HELD) that the Billboards in this case have a ZERO or DEMINUS effect on the environment and in doing so the regulation is being done without compensation?

B. Arbitrarily deny the owner of a re-application procedure for a permit when their regulations clearly permits a re-application "stating under Future submittal—the denial of an application shall in no way affect the future of a new application"?

C. Use the Police Power to levy excessive fines in excess of $400,000.00 for failure to remove existing Billboards while Petitioner proceeded with the appeal process?

D. Use the Police Power to enter onto Petitioner's lands without compensation and destroy Petitioner's "back up" Billboards and then enter a judgment against Petitioner in excess of $26,000.00 as the States cost of removal and destruction?

E. Use the Police Power to terminate two approved Billboard sites in writing after approvals and then take a position in the Appellate Court at Oral Argument that the State had no interest in what Petitioner did on those sites #6 and #7 and be absolved by the Court for interim taking of lands and damages?

F. Shield the State's employees from Damage claims for the taking of Petitioner's lands through Wetland Regulations and Wrongful Acts administered through their public employees and Department Titled positions?

LIST OF PARTIES

All of the parties in this action are listed on the cover page except the original plaintiffs to this action that settled their claims with specific performance by the transferring of title to the properties.

These plaintiffs have been deleted from the title of this petition on the cover page and were listed throughout under the following ... LINCOLN PROPERTY CO. NO. 70, a General Partnership of the State of New Jersey, WILLIAM F. TYNAN, JAY CRANMER, TRAMMEL CROW, ERIC EICHLER, ROBERT F. WALKER, Partners.

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Wesley K. Bell trading as WES OUTDOOR ADVERTISING CO. petitions the Court for a Writ of Certiorari to review the Judgment of the Supreme Court of New Jersey.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

INTRODUCTION

The issues raised by this appeal are substantial, as it is suggested, at the outset, by the method that the Trial Court and the Administrative Law Court refused to decide or hold the Constitutional precedence on the issues raised.

The Appeals Court and Supreme Court of New Jersey sidestepped these same issues and thereby refused to implement the controlling case law that they are required to follow, already held by this and other high courts.

OPINIONS BELOW

The Supreme Court of New Jersey denied Certification on January 7, 1997 on Appeal from the Decision of the Appellate Division of New Jersey Superior Court which issued its opinion on July 2, 1996 and is contained in the Appendix at A5. The Supreme Court of New Jersey denied a Petition for Reconsideration on April 23, 1997 in this matter which is contained in the Appendix at A1.

The original decision from the office of Administrative Law dated June 20, 1984 is contained in the Appendix at A46. The Appellate Division's first decision in this matter on October 22, 1985 is contained in the Appendix at A43.

The State's rejection of Petitioner's re-application on April 29, 1986 is contained in the Appendix at A100.

The Chancery Judges decision on October 8, 1993 dismissing Petitioner's claims in this matter is contained in the Appendix at A37.

The Appellate Divisions decision being appealed in this matter on July 2, 1996 is contained in the Appendix at A5.

JURISDICTION

The subject of this case is the Constitutionality of the New Jersey Wetlands Act and its enforcement by State officials and employees as applied, which totally eliminates and destroys the use of private property without compensation.

The Supreme Court of New Jersey in denying Certification, actually upholds the State's indiscriminate use of its Police Powers against one individual while not applying the same set of standards to another.

Jurisdiction of this Court to review the final judgment of the Supreme Court of New Jersey is conferred by 28 U.S.C. 1257(2) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant portions of the First, Fifth, Thirteenth and Fourteenth Amendments of the United States Constitution and portions of the New Jersey Wetlands Act and its enforcement thereof, are set forth in the Appendix at A103.

PROCEDURAL HISTORY

This matter and a series of events commenced on October 27th 1978 when Defendant, Third Party Plaintiff Wesley K. Bell (who is the owner and founder of Wes Outdoor Advertising Co.) entered into a first option to purchase agreement for lands on Route 72 (Beach Haven West) in Stafford Township, New Jersey.

One of these tracts of land had three large single sided Billboards thereon, which were erected on the wetlands in 1966 prior to any wetland legislation.

In accordance with Bell's option to purchase, Bell was required to assist Lincoln Property Co. in applying for additional Billboard approvals from Stafford Township and the New Jersey Department of Transportation (hereafter referred to as N.J.D.O.T.).

Approvals for back-up Billboards and four separate additional locations were obtained from both agencies. (two were on the south side of Route 72 and two were on the north side of Route 72).

These additional locations were sites #2, #3, #6 and #7 and back-up Billboards were approved on sites #1, #4 and #5 which were the sites with pre-existing Billboards.

The New Jersey Department of Transportation (N.J.D.O.T.) and Stafford Township approved the permits for both the new construction and the re-construction of the existing Billboards at sites #1 through #7.

After obtaining the aforementioned Permits, Bell entered into an *Agreement of Sale with Possession* thus replacing the Option Agreement.

The Agreement of Sale was extended on several occasions until closing on February 26th 1989 which resulted from a settlement in this action which was brought by Lincoln Property in an attempt to expedite a closing or termination of the Agreement of Sale with Possession.

During the pendency of the Agreement of Sale and extensions, Bell proceeded with the re-construction and back-ups of site #1, #4 and #5.

In December 1982 when Bell began construction on Site #2, the New Jersey Department of Environmental Protection (hereafter referred to as N.J.D.E.P.) stopped the job with a verbal Stop Work Order by a N.J.D.E.P. inspector.

At that time the inspector gave verbal permission to Bell for the construction to proceed on the back-up construction of sites #4 and #5 since (in his opinion) those sites and the proposed back-ups were exempt from regulation because the Billboards pre-existed the Wetlands Act on those sites.

Bell then submitted an application for N.J.D.E.P. approval for sites #2 and #3 and at the time of Administrative Law Hearings, N.J.D.E.P. alleged additional violations at sites #1, #4 and #5 even though the inspector gave permission for the work and the N.J.D.E.P. also alleged that sites #6 and #7 were wetlands and that they should be included.

Agreement was then reached that the hearing would include all sites from #1 through #7.

At the beginning of the Hearings N.J.D.E.P. withdrew their objections to sites #6 and #7 since they now agreed that the N.J.D.E.P. had removed these properties from the Wetlands Designation after application and approval to Bell several years previous.

The Administrative Law Judge Steven C. Reback in his opinion dated June 20th 1984 addressed this issue on page two, line 21 to line 29 as follows . . .

> "By subsequent letter of Feb. 27, 1984, directed to counsel for petitioner by acting director of the Division of Coastal Resources, the Department indicated that two of the proposed billboards which had initially been included within the denial are located on an area which has since been redesignated as upland, and thus the Department will no longer assert jurisdiction over that area as wetlands (J-1). Accordingly, and for purposes of this proceeding, Mr. Bell's appeal of the permit denial is limited to five billboards, two of which are proposed and three of which require additional reconstruction, all of which are located on the southern side of Route 72 and which, for purposes of clarity have been designated on exhibit P-3 as sites 1 through 5."

(full opinion at A46.)

In the hearings before Administrative Law on April 2nd 1984, the Deputy Attorney General, the Administrative Law Judge and Bell's Attorney agreed that Bell was preserving his Constitutional Claims for Damages, Legal Fees and Constitutional Violations for Superior Court.

At the conclusion of the Administrative Law Hearings, the Judge upheld the denial of the N.J.D.E.P. Permits, and the Commissioner of N.J.D.E.P. also upheld the denial with a slight change removing Aesthetics as a ground for denial of the Wetland Permits.

The Appellate Division on October 22nd 1985 upheld the denial of the Wetland Permits under Docket No. A-1074-84T6 and the basis of the denial by the agency, the Commissioner and the Administrative Law Judge was cited by the Appellate Court as follows . . .

> "The agency's regulatory authority is derived from the Wetland Act, *N.J.S.A.* 13:9A-1, more particularly *N.J.S.A.* 13:9A-4, and appellants application is governed by *N.J.A.C.* 7:7E-3.26(b), which was promulgated thereunder. The determination under review is based upon findings by the Administrative Law Judge and the Commissioner that appellant had failed to demonstrate the absence of any 'prudent or feasible alternative on a non-wetland site' as required by *N.J.A.C.* 7:7E-3.26(b)ii. Also see *N.J.A.C.* 7:7A-1.5."

(see full opinion at A46.)

Bell then consulted with his present legal counsel who is now the Honorable Jan M. Schlesinger, *J.S.C.* who advised Bell that rather than appeal to the New Jersey Supreme Court he should re-apply to N.J.D.E.P. since the regulations not only permitted re-application but they encouraged re-application without fee. (*N.J.A.C.* 7:10-3.8 and *N.J.A.C.* 7:7-2.2 published May 4th 1972 4 N.J.R. 96, page 14) which provides . . .

> Denial of application; future submittal—"the denial of an application shall in no way adversely affect the future submittal of a new application."

N.J.A.C. 7:7-4.9 provides . . .

> "Withdrawal, resubmission and amendment of applications
>
> (b) If an application is denied, the applicant may resubmit an application for a revised project on the same site within one year without additional fees. The resubmitted application will be treated as a new application, although references may be made to the previously submitted application. An applicant who wishes to appeal the denial, and at the same time revise the application may do so in accordance with the procedures in *N.J.A.C.* 7:7-5.4.

Bell re-submitted a new Wetlands Application to N.J.D.E.P. on April 4th 1986 and N.J.D.E.P. rejected it without processing on April 29th 1986.

On April 28th 1987 (within one year) Bell brought a Federal Civil Rights Action in the United States District Court under Docket #87-1576 (AET) in which Bell sought losses, Civil Rights and Constitutional Damages, Legal Fees, Regulatory Taking Claims and N.J.D.E.P. Wetland Permit Approvals on sites #2, #3 and back-up to sites #1, #4 and #5.

In 1988 when Lincoln Property Co. brought this action to terminate or compel finalization of Bell's purchase agreement, Bell counterclaimed and also named N.J.D.E.P., its officials and employees, and Stafford Township as Third Party Defendants and demanding damages for Regulatory and other claims and damages.

Lincoln Property settled their portion of the action leaving the Third Party Defendants and Bell remaining as litigants.

The Deputy Attorney General handling the case at that time, requested Bell and his attorney to "withdraw and transfer" the Federal Court Action under Docket #87-1576 (AET), which was still pending, to be amended into the Chancery Action (this case) and the parties agreed.

After the amended complaint was filed the State moved for dismissal of the entire complaint and Judge Huber, *J.S.C.* issued a dismissal Order.

After Lincoln Property Co. settled and transferred the Deeds and N.J.D.O.T. Billboard Permits to Bell, he filed an application for the transfer on April 16th 1990 at which time N.J.D.E.P. requested N.J.D.O.T. *not to*

approve the transfer and the N.J.D.E.P. then re-asserted its wetland authority of sites #6 and #7. (see Exhibit #3 at A101.)

N.J.D.O.T. then refused to transfer the Permits in Violation of *N.J.S.A.* 52:14B-11 and ordered Bell to remove all advertising from all sites on the properties including those predating the Wetlands Act.

The matter is presently before Administrative Law under Docket No. O.A.L. 6226-93 where the N.J.D.O.T. has reduced its penalty demands from $800,000.00+ to $200,000.00 and the Commissioner has upheld an Order that the matter proceed without hearings to determine any violations exist. The Appellate Division has denied Leave to Appeal even though *N.J.S.A.* 52:14B-11 provides . . .

> "REVOCATION OR REFUSAL TO RENEW LICENSE; HEARING—No agency shall revoke or refuse to renew any license unless it has first afforded the licensee an opportunity for hearing in conformity with the provisions of this act applicable to contested cases. If a license has, in acordance with law and agency rules made timely and sufficient application for a renewal, his license shall not expire until his application has been finally determined by the agency. Any agency that has authority to suspend a license without first holding a hearing shall promptly upon exercising such authority afford the license an opportunity for hearing in conformity with the provisions of this act."

The Appellate Division has, on several occasions, denied Leave to Appeal from Chancery and Administrative Law and on October 28th 1994 Judge William Huber, *J.S.C.* designated his Order as Final pursuant to Rule 4:42-2 and this appeal followed.

STATEMENT OF THE CASE

1. Petitioner Wesley K. Bell trading as Wes Outdoor Advertising Co. has been in the Outdoor Advertising business in New Jersey since April 1957.

2. Petitioner Wesley K. Bell operates a First Amendment Activity and is a party with a standing to raise the constitutional issues in a context warranting such a decision in order to fairly resolve the legal controversy endangered by the application of regulations. *Bell v. Stafford,* 110 N.J. 384, 541 A2d 692 (N.J. 1988).

3. The Burden of Proof in this matter fully and clearly shifts to the State and places the burden of meeting the four part standard, set forth in *Bell v. Stafford (supra)* and *Metromedia, Inc. v. San Diego,* 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) at 507 quoting *Central Hudson Gas & Elect. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 563-66, 100 S.Ct. 2343, 65 L.Ed.2d 341, 349-51 (1980). *Doland v. City of Tigard,* U.S.S.Ct. _____ (June 24th 1994).

4. N.J.D.E.P., Stafford Township and its employees and officials are not immune from damage claims for Civil Rights Damages or Constitutional Regulatory Taking Claims. *General Motors v. City of Linden* decided February 3rd 1995 by the Appellate Division of N.J. Superior Court, also *Menlo v. Hafer,* 112 S.Ct. 358 (1991) in which the court held . . .

> "We hold that state officials, sued in their individual capacities, are 'persons' within the meaning of 1983. The Eleventh Amendment does not bar such suits nor are State Officers absolutely immune from personal liability under 1983 solely by virtue of the 'official nature of their acts.' "

5. Enforcement of the Wetlands Act against Petitioner and Third Party Plaintiff is clearly a violation of the First Amendment, Fifth, Thirteenth, Fourteenth and Fifteen Amendments of the United States Constitution and also a violation of the New Jersey Constitution, and Article Three, Section Two of the U.S. Constitution, also Title 142 of the U.S.C. Sections 1983, 1985 (3) and 1986.

REASONS FOR GRANTING THE WRIT

POINT I

Reserved Rights And Damage Claims Cannot Be Denied After Agreement By State Attorney General At Trial, And On The Record.

In the present case, the attorney representing Bell before the Administrative Law Judge Steven C. Reback, clearly reserved Bell's rights on the record for Superior Court. (see transcript of April 2nd 1984, page 3, line 2 to page 4, line 11 in which states . . .)

> Mr. Hluchan: Your Honor, first of all, at this point I would like to indicate to the Court that we are withdrawing the claim set forth in the prehearing Order without prejudice to any future proceedings of taking without just compensation. It is my reading of the statute that contained in the Wetlands Act, 13:9A, that such action for a claim of taking without just compensation or inverse condemnation appears to be cognizable only in the Superior Court, and it would also appear to be cognizable only in the event that the permit we are seeking here is denied.
>
> I really don't feel that this forum has jurisdiction, and because in any event, at this point, it would be premature. We would withdraw that claim at this point without prejudice to whatever may occur in the future.
>
> The Court: Very well.
>
> Mr. Hluchan: At this time, I call Wesley K. Bell.
>
> Mr. Hluchan: By the way, before I begin to question Mr. Bell, your Honor, I did indicate to Ms. Lessne a number of weeks ago that we would be withdrawing that claim without prejudice and just

> ask, at this point—there was an agreement at that point that it would be withdrawn without prejudice and I'd ask for confirmation of the understanding.
>
> Ms. Lessne: I have no objection.
>
> Mr. Hluchan: Okay.

The United States District Court for New Jersey recognized the right of a Plaintiff that made explicit reservations of a claim, "his right to return will in all events be preserved". (see *Hotel & Restaurant Employees v. Read*, 641 F.Supp 757 (D.N.J. 1986) in this case the court relied on *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964)). The Court cited from *England*:

> In England the Supreme Court faced a situation similar to the present case in that the state court was asked to construe a state statute "against the backdrop" of a federal constitutional challenge. 375 U.S. at 420, 84 S.Ct. at 467. Whether or not the state court chose to address the federal constitutional issue, a party could still in advance of a state court action reserve the right to return to federal court to litigate that federal issue. *Id.* at 421, 84 S.Ct. at 467-68. The England court held that when a litigant makes the explicit reservation, "His right to return (to the federal court) will in all events be preserved." *Id.* at 422, 84 S.Ct. at 468. Even in the absence of an express reservation, "in no event" can a litigant be denied his right to return unless he "voluntarily . . . and fully litigated his federal claims in the state courts." *Id.* at 421, 84 S.Ct. at 468.

POINT II

The New Jersey Department of Environmental Protection May Not Re-Assert Wetland Authority On Sites #6 And #7 After They Withdrew That Authority At The Administrative Law Hearings.

The N.J.D.E.P. withdrew its wetland designation on sites #6 and #7 prior to the Administrative Law Hearings in 1984.

The N.J.D.E.P. agency has no legal authority to re-designate sites #6 and #7 as wetlands or adjacent to wetlands for the purpose or the ability to force this litigant to re-submit a new application subject to any more recent regulations adopted after February 27th 1984 at which time the N.J.D.E.P. issued a letter which was submitted to the Administrative Law Judge for the purpose of withdrawing sites #6 and #7 from the hearing.

The N.J.D.E.P. issued a letter dated April 16th 1990 from Kathleen M. Cann, Chief of its Bureau of Enforcement to the N.J.D.O.T. requesting that they not issue Bell the transfer of Permits on all sites #1 through #7.

The letter in paragraph three states . . .

> "Accordingly Wes Outdoor Advertising is required to apply for a Waterfront Development *and* Wetlands Type A. permits for those signs not yet constructed."

(see letter at A101.)

This letter is a constitutional violation and a continuing regulatory taking of Bell's properties and falls within the holdings that the New Jersey Court system must follow.

This suit seeks to force the N.J.D.E.P. to process the applications on sites #1 through #5 and also to override the denials on constitutional grounds.

The Waterfront Development Act has been held to be unconstitutional by this Court twice and once by the New Jersey Supreme Court.

(see *Last Chance Dev. Co. v. Keane,* 232 N.J. Super. 115 (App. Div. 1989) affirmed 119 N.J. 425 (1990) and *Long Beach Oceanfront Pro. Owners Assn. v. N.J.D.E.P.,* 245 N.J. Super. 143 (App. Div. 1990).

These issues have never had a trial on the merits and are ripe for relief.

POINT III

Regulatory Taking Claims Are Not Barred And Must Proceed To Trial.

In the present case Defendants have prevented Bell from the use of his lands since 1982 and as a direct result have caused Bell to suffer extensive legal fees, have caused the purchase to escalate to $339,180.56 resulting in an increase in the purchase price of $150,680.56, plus the loss of ownership of site #7 to satisfy the balance due on the contract of purchase.

The contract of purchase required Bell to turn over a large portion of the advertising revenues during its pendency to reduce the balance due at closing.

If the N.J.D.E.P. had not imposed its regulatory taking of Bell's property by withholding and denying their issuance, the entire purchase price of the property would have been satisfied years before any of the resulting litigation took place, and the continuing increases in damages would not have occurred.

Additional losses are the lost revenues from the Billboards on sites #2, #3, #6 and #7 and now additional occurrences are resulting from the N.J.D.O.T.'s refusal to transfer the original permits issued to Lincoln Property Co. prior to closing title.

POINT IV

The Wetlands Act Is An Unconstitutional Regulatory Taking Of Private Property As Applied By The New Jersey Department Of Environmental Protection.

In this case the Wetlands Act as enforced against Bell on these properties is an unconstitutional application of law, is a regulatory taking without compensation and violates the First, Fifth, Thirteenth and Fourteenth Amendments of the United States Constitution and also violates the New Jersey Constitution as well as Article Three, section two of the U.S. Constitution and Title 42 of the U.S. Code, sections 1983, 1985 (3) and 1986.

In this case before this court the N.J.D.E.P. has denied Bell of the only possible use of his Wetlands Properties in which there would be no adverse or detrimental effects on the wetlands or the environment.

There are overriding federal and state policies favoring protection of coastal area. Nevertheless, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) the court states that . . .

> "when the character of the government action is a permanent physical occupation of the property, our cases uniformly have found a taking to the extent of the occupation without regard to whether the action achieves an important public benefit or has only a minimal economic impact on the owner" citing 458 U.S. at 434-35.

In *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2892 (1992) the court held . . .

> "While property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking".

In *Kohl Indust. Park Co. v. County of Rockland,* 710 F.2d 895, 900 (2nd Cir. 1983) the court said . . .

> "the limits of police power may be extensive, although ill-denied, but common justice requires that such power should not be used to circumvent the constitution inhibition against appropriating private property for a public use without compensation".

The most recent controlling case law to become final on these wetland and regulatory taking issues is the Federal Circuit Court's decision issued June 15th 1994 in *Loveladies v. United States,* 28 Fed. 3d. 1171 (Fed.Cir. 1994).

On February 1st 1995 the United States Attorney General abandoned their appeal of this case to the U.S. Supreme Court.

The *Loveladies* holding is now the controlling case law for New Jersey and the Nation.

In *Loveladies Harbor Inc. v. The United States,* 21 Cl. Ct. 153 (1990) which has been upheld by the United States Court of Appeals, Federal Circuit on June 15th 1994, *supra*

> The U.S. Claims Court held that . . . "The determination governmental action constitutes a taking is, in essence a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest (citing *Agins,* 447 U.S. at 260-61).

At page 7 the *Loveladies* case relied on the following new three point standard for regulatory takings . . .

> "With regard to the interest alleged to be taken, there has been a regulatory taking if . . .
>
> (1) There was a denial of economically viable use of the property as a result of the regulatory imposition;

(2) The property owner had distinct investment backed expectations; and

(3) It was an interest vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.

The current case law holding for Regulatory Takings by means of Wetland Regulations of private property was addressed by the Federal Circuit in *Loveladies* (*supra*) at page 5, line 48 to page 6, line 6 . . .

"This question was finally definitively answered by the Court, after a number of false starts (FN10) in *First English Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987). The Constitution, said the Court, requires just compensation for a regulatory taking from the date it occurs until the date of the regulation's recission or amendment. A simple post hoc declaration of invalidity did not provide the remedy the constitution mandated. *Id.* at 319. see also *Yuba Natural Resources Inc. v. United States*, 821 F.2d 638 (Fed. Cir. 1987).

The Supreme Court of the United States has held in *Lucas v. South Carolina Coastal Commission*, 505 U.S. _____, 112 S.Ct. 2886 (1992) . . .

"The ban on construction deprived him of all 'economically viable use' of his property and therefore effected a 'taking' under the Fifth and Fourteenth Amendments that required the payment of just compensation" citing *Agins v. Tiburon*, 447 U.S. 255, 261.

In *Lucas v. South Carolina* (*supra*) the Supreme Court held . . .

"a state may not transform private property into public property without compensation . . . citing *Webb's Fabulous Pharmacies Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

Third Party Defendants have denied Petitioner Bell all practical use of his lands without compensation for their regulatory scheme which exceeds the authority granted them by the legislature under the Wetlands Act *N.J.S.A.* 13:9 A-1 *et seq.* and on sites #6 and #7 they have done so without any regulatory authority or process for appeal.

POINT V

The Wetlands Act Foreclosed Billboards, A Medium Of Communication Entering The Coastal Resorts Of South Jersey If They Are Not Already In Existence Prior To The Enactment Of The Wetlands Act.

The Wetlands Act forecloses and prohibits billboards from being constructed on the Wetlands in New Jersey and therefore forecloses an entire media from reaching the traveling public into South Jersey Resort areas.

In *City of Ladue v. Gilleo* (decided June 13th 1994), the Supreme Court of the United States held at page 12, line 22 . . .

> "Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech." (citing *Stone, Content-Neutral Restrictions,* 54 U. Chi. L. Rev. 46, 57-58 (1957). The Court long has recognized that by limiting the availability of particular means of communication, content-neutral restrictions can significantly impair the ability to individuals to communicate their views to others . . . to ensure the widest possible dissemination of information. *Assoc. Press v. U.S.,* 326 U.S. 354 U.S. 476, 484 (1957).

POINT VI

Re-Application Denial And Rejection Is Pre-Empted By The Statute And Regulations Permitting Re-Application After Denial, Therefore Denying Petitioner Of His Constitutional Protections.

The Wetlands Act authorizes the N.J.D.E.P. to implement the rules and regulations which were adopted and amended under *N.J.A.C.* 7:10-1.1 *et seq.* on April 13th 1972 and published in *4 N.J.R.94* on May 4th 1972, page 12 to page 15 specifically addressing re-application under *N.J.A.C.* 7:10-3.8 on page 14 as follows . . .

> "Denial of application; future submittal. 'the denial of an application shall in no way adversely affect the future submittal of a new application.' "

The Coastal Permit Program Regulations *N.J.A.C.* 7:7-2.2 Wetlands incorporates the requirements of the Wetlands Order issued on April 13th 1972 pursuant to P.L. 1970, c 272.

In *11126 Baltimore v. Prince Georges County Md.*, 58 F.3d 988 (4th Cir. 1995) the court held . . .

> "In a controlling 1st Amendment case the Court applied the *Freedman* standards that . . .
>
> (1) any restraint prior to Judicial review can be imposed *only* for a specified brief period during which status quo must be maintained and,
>
> (2) expeditious judicial review of that decision must be available, and,
>
> (3) the censor (STATE IN THIS CASE) must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.
>
> where it . . . assured an almost immediate judicial determination of the validity of the restraint". *Redner v. Dean*, @ (F.3d 1495, 1501-02, 11th Cir.

1994) holding that prompt judicial review is never available when judicial reviews may not be sought until exhaustion of administration remedies under a scheme that fails to provide time restraints for administrative decision, cert. denied, _____ U.S. _____, 115 S.Ct. 1697, 131 L. Ed. 2d 560 (1995) c/. *East Brooks Books Inc. v. City of Memphis*, 48 F.3d. 220, 225 (6th Cir. 1995) indicating that potential delay of 5 months is impermissible.

In *Richard J. Elrod v. John Burns*, 96 S. Ct. 2673 (1976) the Court held . . .

> "Loss of First Amendment Freedoms, even for minimal periods of time, unquestionably constitute irreparable injury" (Per Mr. Justice Brennon, with two Justices joining and two Justices concurring in result.)

Additional case law just decided that has a direct controlling effect in this case is as follows . . .

"*44 Liquormart Inc. v. Rhode Island*, U.S. Sup. Ct. No. 94-1140 (5-13-96) 64 L.Week 1169 the court held . . .

> 'blanket bans' on commercial speech are reviewed with special care under *Central Hudson Gas & Electric Corp.* (citations omitted) and that regulation of truthful, nonmisleading commercial speech is subject to the same rigorous scrutiny as restrictions are other speech."
>
> "held that the ban fails the Fourth prong because it is broader than necessary".
>
> "In evaluating the ban's effectiveness in advancing the State's Interest, we note that a commercial speech regulation 'may not be sustained if it provides only ineffective or remote support for the Govt.'s purpose' " (citing *Central Hudson*).
>
> "For that reason, the State bears the burden of showing not merely that its regulation will advance its' interest, but also that it will do so to a material degree."

> "Although we do not dispute the proposition that greater powers include lesser ones, we fail to see how that syllogism requires the conclusion that the State's power to regulate commercial activity is 'greater' than its' power to ban Truthful, nonmisleading commercial speech."

In the present case from the beginning the burden of proof has been WRONGLY placed on the Petitioner instead of the State of New Jersey in spite of more recent (controlling) holding in this field, see *Bell v. Stafford*, 110 N.J. 384 and *Central Hudson Gas & Electric Corp. v. Public Service Comm'n.*, 447 U.S. 557, 563-66, 100 S.Ct. 2343, 65 L.Ed.2d 341, 349-51 (1980).

CONCLUSION

It is respectfully requested that Petitioner be granted Certification in this case.

WESLEY K. BELL, *Pro Se*
P. O. Box 538
188 Rt. 72
Manahawkin, New Jersey 08050
(609) 597-3222

APPENDIX

Order of the Supreme Court of New Jersey, Denying Reconsideration of Petition for Certification, Dated April 23, 1997.

SUPREME COURT OF NEW JERSEY
September Term 1996
M-1049/1050
42, 768

FILED
APR 24 1997
STEPHEN W. TOWNSEND
CLERK

LINCOLN PROPERTY CO., NO. 70, etc., *et al.*,
Plaintiffs,

v.

WESLEY K. BELL,
Defendant Third-Party
Plaintiff-Movant,

v.

STATE OF NEW JERSEY, STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Third-Party Defendants.

O R D E R

This matter having been duly presented to the Court, it is ORDERED that the motion to disqualify the Chief Justice (M-1049) is denied; and it is further

ORDERED that the motion for reconsideration of the petition for certification (M-1050) is denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 23rd day of April, 1997.

/s STEPHEN W. TOWNSEND
CLERK OF THE SUPREME COURT

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

STEPHEN W. TOWNSEND

CLERK OF THE SUPREME COURT
OF NEW JERSEY

Order of the Supreme Court of New Jersey, Denying Petition for Certification, Dated January 7, 1997.

SUPREME COURT OF NEW JERSEY
C-496 September Term 1996
42, 768

FILED
JAN 7 1997
STEPHEN W. TOWNSEND
CLERK

LINCOLN PROPERTY CO., NO. 70, etc., *et al.*,
Plaintiffs,

v.

WESLEY K. BELL,
Defendant Third-Party
Plaintiff-Petitioner,

v.

STATE OF NEW JERSEY, STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Third-Party Defendants-
Respondents.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-1089-94 having been submitted to this Court, and the Court having considered the same;

it is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 7th day of January, 1997.

/s STEPHEN W. TOWNSEND
CLERK OF THE SUPREME COURT

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

STEPHEN W. TOWNSEND

CLERK OF THE SUPREME COURT
OF NEW JERSEY

Decision of the Superior Court of New Jersey, Appellate Division, Filed July 2, 1996.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1089-94T3, A-1842-94T3[1]

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

FILING DATE
APPELLATE DIVISION
JUL 2 1996
Domilla Fox
Clerk

LINCOLN PROPERTY CO. NO. 70, a general partnership of the State of New Jersey, WILLIAM F. TYNAN, JAY CRANMER, TRANNEL CROW, ERIC EICHLER, ROBERT F. WALKER, partners,

Plaintiffs,

v.

WESLEY K. BELL,

Defendant/Counter-Claimant/ Third Party Plaintiff-Appellant,

v.

STATE OF NEW JERSEY, STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, COMMISSIONER OF ENVIRONMENTAL PROTECTION and TOWNSHIP OF STAFFORD, DALE LESSNE, PHILIP SANDINE, JOHN R. WEINGART,

[1] These appeals have been consolidated (consolidated cases) for the purpose of this opinion because they arise from the same factual background and involve similar issues.

ANTHONY SCOPPETUOLO, ROBERT PEIL, JR., STEVEN WHITNEY, and KATHLEEN M. CANN, Individually and in his/her official capacity as an official of the Department of Environmental Protection,

Third Party Defendants-Respondents.

WESLEY K. BELL,

Plaintiff-Appellant,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION and the TOWNSHIP OF STAFFORD, a municipality in the County of Ocean,

Defendants-Respondents.

Argued and Submitted June 3, 1996—Decided Jul 02 1996

Before Judges P.G. Levy and Eichen

On appeal from Superior Court, Chancery Division—General Equity Part, Ocean County.

Appellant Wesley K. Bell argued *pro se.*

Alice B. Cesaretti, Deputy Attorney General, argued the cause for respondents (Deborah T. Poritz, Attorney General, attorney; Mary C. Jacobson, Assistant Attorney General, of counsel; Ms. Cesaretti on the brief).

No other parties participated in this appeal.

PER CURIAM

The genesis of these consolidated cases is the 1984 order and final decision of the Commissioner of the Department of Environmental Protection (DEP),

pursuant to *N.J.A.C.* 7:7A-1.5[2] (the wetlands regulations), denying appellant Wesley K. Bell's application for a permit to construct billboards and ordering him to remove existing billboards on a tract of land designated as regulated wetlands located in Stafford Township, Ocean County. The primary issue presented on this appeal is whether appellant is barred under the applicable statute of limitations, *N.J.S.A.* 13:9A-6, and the entire controversy doctrine from challenging the 1984 final decision and order of the DEP.

Appellant, who appeals *pro se,* primarily contends that the administrative order has effectively deprived him of property "without affording him just compensation" in violation of the Fifth Amendment of the United States Constitution and Article I, Paragraph 20 of the New Jersey Constitution. Our review of the record in light of the applicable law satisfies us that appellant is barred from asserting his challenge to the DEP's order because the limitations period for bringing such claim has expired and because the entire controversy doctrine bars the claim.

An explication of the issues involved requires a discussion of the procedural events preceding this appeal. In an earlier decision of this court addressing issues similar to those presented here, we set forth the "convoluted procedural history" of this case. *Lincoln Property Co. v. Bell,* No. A-4870-90T2 (March 25, 1993) (the 1993 decision). In the interest of consistency, we reproduce, in relevant part, some of our findings there, supplementing the background where necessary. *See Gottlob v. Lopez,* 205 *N.J. Super.* 417, 421 (App. Div. 1985), *certif. denied,* 104 *N.J.* 373 (1986).

---

[2] That regulation is now recodified as *N.J.A.C.* 7:7E-3.27.

> In 1982, appellant filed a "type A" wetlands permit application with the DEPE,[3] proposing construction of additions to three billboards erected prior to the promulgation of the wetlands delineation map. In addition, appellant sought permission to install pilings for several double-faced billboards. Later that year, the DEPE inspected the property, which was at that time, owned by Lincoln Property Co. (Lin Pro), and found that billboards had been erected in violation of the [wetlands] regulations. Lin Pro advised the DEPE that it had forwarded its complaint to appellant who had possession of the property and who was under contract to purchase it.

Appellant appealed the denial of his application for a wetlands permit to the Office of Administrative Law, and on June 20, 1984, a hearing was conducted before an administrative law judge (ALJ). Appellant now contends that he reserved his right to assert a regulatory takings claim under *N.J.S.A.* 13:9A-6 during that hearing. We reproduce the relevant portions of the colloquy between the ALJ and appellant's then attorney.[4] The claimed reservation follows:

> MR. HLUCHAN [appellant's attorney]: Your Honor, first of all, at this point I would like to indicate to the Court that we are withdrawing the claim set forth in the prehearing Order without prejudice to any future proceedings of taking without just compensation. It is my reading of the statute that [is] contained in the Wetlands Act, 13:9A, that such

---

[3] In 1991, the DEP was redesignated as the Department of Environmental Protection and Energy (DEPE). In 1994, the DEPE was again redesignated as the DEP. See the reorganization plan set out under *N.J.S.A.* §13:1D-1.

[4] Appellant's appendix does not contain a transcript of those proceedings, but his brief recites the purported colloquy between the attorneys and the ALJ on April 2, 1984. Despite the impropriety, we reproduce the colloquy to enhance comprehension of the issue.

> action for a claim of taking without just compensation or inverse condemnation appears to be cognizable only in the Superior Court, and it would also appear to be cognizable only in the event that the permit we are seeking here is denied.
>
> I really don't feel that this forum has jurisdiction, and because in any event, at this point, it would be premature. We would withdraw that claim at this point without prejudice to what ever may occur in the future.
>
> THE COURT: Very well.

The ALJ issued his initial decision on June 20, 1984 recommending that the DEP's denial of the permit be affirmed and that the billboards be removed. Adopting portions of the ALJ's initial decision as a final decision, the Commissioner of the DEP affirmed the ALJ's "conclusion and orders." The background concerning the DEP's determination is set forth in our 1993 decision as follows:

> The DEPE determined that all of the criteria contained in the regulation must be satisfied as a prerequisite to issuance of a permit. Although appellant had established that erection of the billboards would only minimally impact upon the natural contour and vegetation of the property, the DEPE found that the proposed activity was not water-oriented and could feasibly be conducted on nearby non-wetlands sites. While conceding that these other sites, located along Route 9, did not have the same commercially desirable characteristics[,] the DEPE concluded that the absence of a prudent and feasible alternative to the wetland property had not been shown.
>
> Appellant filed a direct appeal. Although phrased in a variety of ways, appellant asserted that no feasible non-wetlands site was available and that the DEPE's contrary conclusion was arbitrary and

> capricious. We found no merit in these contentions and affirmed the DEPE's determination [on October 22, 1985]. No petition for certification was filed.
>
> Instead, on April 9, 1986, appellant submitted another "Type A" wetlands permit application in which it sought to legalize the existing billboard structures and install additional pilings. The DEPE subsequently returned appellant's application and fee. In its accompanying letter, the DEPE noted that the application was substantially the same as the one that had been denied previously. No appeal was taken from this disposition.
>
> In a somewhat desultory fashion, the DEPE attempted to secure appellant's compliance with its administrative order. We need not describe in detail the DEPE's efforts in that regard. Suffice it to say, Lin Pro felt sufficiently threatened by these actions to institute a suit in the Chancery Division to compel appellant to remove the billboards [in 1988]. Appellant filed an answer and a third-party complaint [on February 1, 1989], naming the DEPE, its commissioner, and the Township of Stafford, and asserting among other things that the regulation was unconstitutional.[5]
>
> [*Lincoln Property Co. v. Bell*, No. A-4870-90T2 (March 25, 1993).]

In the third party complaint brought pursuant to 42 *U.S.C.A.* §1983 and the New Jersey Uniform Declaratory Judgments Act, *N.J.S.A.* 2A:16-50 to -62, appellant claimed that the denial of the permit by the DEP and

---

[5] In 1987, appellant had also filed an action in federal district court in New Jersey against the DEPE and the individually named defendant DEP officers, asserting the DEP had taken his property without compensation and violated his right of free speech. In June 1989, the parties stipulated to a dismissal of the federal case. Bell's attorney advised the Chancery Division judge overseeing *Lincoln Property v. Bell* that the federal action was dismissed "so that the claims ... could be restated in [the Chancery Division] action," as was done.

the wetlands regulations underlying that decision "constitute[d] the taking of appellant's property for a public purpose without just compensation" in violation of the state and federal constitutions, and also deprived him of his constitutional right to freedom of speech and his right not to be deprived of liberty or property absent due process of law."[6]

In March 1990, the DEP filed a counterclaim seeking to compel appellant to remove the billboards and pilings erected in violation of the wetlands regulations and to collect monetary penalties and attorneys' fees. Sometime thereafter, appellant moved for partial summary judgment on his constitutional claims, as well as for transfer of his third party complaint to the Law Division for a jury trial. The DEP cross-moved to dismiss appellant's third party complaint on entire controversy grounds, to enforce the final decision of the Commissioner, and to collect monetary penalties. At oral argument on November 28, 1990, appellant asserted that his third party complaint should not be barred under the entire controversy doctrine because he had reserved his right to raise his constitutional claims in the 1984 administrative proceedings, among other reasons.

After hearing argument, the Chancery Division judge denied the DEP's cross-motion to dismiss the complaint, determining a hearing was required on the constitutional claims, but denied appellant's requests for a jury trial and transfer to the Law Division. The DEP filed a motion for reconsideration, resulting in the transfer of the constitutional issues directly to this court,

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[6] In February 1989, Lin Pro and appellant entered into a settlement agreement, leaving only the third-party defendants and appellant as litigants, after which appellant purchased the property underlying his billboards from Lin Pro.

pursuant to *R.* 1:13-4(a) and *R.* 2:2-3(a)(2), and stayed the DEP's cross-motion to enforce the Commissioner's decision and for related monetary relief.

In the 1993 opinion, this court held the "constitutional claims" were barred under the entire controversy doctrine. In so doing, we made the following observations:

> The point to be stressed is that appellant never challenged the constitutionality of *N.J.A.C.* 7:7A-1.5 in prior administrative and judicial proceedings. At no time during the administrative appeal process or in the appeal of this court did appellant raise the issue of the constitutionality of the regulation. Nor did he petition, for certification to the Supreme Court from our 1985 decision. Instead, appellant was content to maintain the billboards on the wetlands site and challenge in piecemeal fashion the DEPE's efforts to remove them. Under these circumstances, we will not entertain appellant's belated constitutional attack upon the validity of the regulation.

After explaining the importance of resolving all related claims and issues in one litigation proceeding, we concluded appellant should have raised his "constitutional claims" either before the DEP in 1984 or before this court in 1985 when appealing the DEP's denial of the permit application. We stated, in relevant part:

> [T]he ALJ determined that a permit application was to be denied under the regulation if an alternative non-wetland site was feasible even though the proposed activity had only a *de minimis* effect on wetlands concerns. This interpretation of the regulation is the predicate for all of appellant's constitutional claims. Thus, upon receipt of the ALJ's initial decision, appellant knew all he needed

> to know to raise the arguments he now advances. Possessing this knowledge, appellant did not raise the issue before the DEPE Commissioner.
>
> . . . A constitutional challenge to a statute or regulation should be initially presented to the administrative agency for adjudication to ensure an adequate factual record. . . .
>
> In any event, appellant's constitutional claims were clearly ripe for resolution when he appealed to this court from the denial of his permit application. Appellant could have challenged the constitutionality of the regulation and sought damages for deprivation of his civil rights in this court. Of course, we would have remanded the civil rights claim to either the Law Division or the Chancery Division, but we would have retained jurisdiction over the attack upon the regulation. The simple and overriding fact is that appellant chose to withhold his constitutional claims. We need not speculate upon his motives. The point is that, by holding back a component of his claim, appellant improperly fractionalized the litigation, presumably to the public's detriment.

Appellant moved for reconsideration before this court. The record reflects that appellant again argued he had reserved his right to raise "constitutional claims" during the administrative proceedings in 1984. This court denied the motion on April 21, 1993 without comment, and the Supreme Court denied appellant's petition for certification.

On May 14, 1993, the DEP moved for summary judgment on its counterclaim, seeking to enforce the Commissioner's 1984 final order directing appellant to remove his billboards, as well as for monetary penalties and attorneys' fees. During oral argument, appellant also asserted, apparently for the first time, that the DEP improperly rejected his re-application for a wetlands

permit in 1986. The Chancery Division judge rejected this argument, dismissed appellant's third-party complaint with prejudice, and on October 8, 1993, ordered appellant to "remove and properly dispose of all . . . billboards and pilings[ ] erected in violation of the Wetlands Act of 1970, *N.J.S.A.* 13:9A-1 to -10" within sixty days of the date of the order (approximately by December 8, 1993). The judge also granted the Township of Stafford's motion for summary judgment on October 12, 1993. On March 11, 1994, this court denied appellant's motion for leave to appeal (Da 63) as did the Supreme Court.[7]

On April 5, 1994, after appellant failed to remove the billboards and pilings as required, the DEP moved to enforce the October 8, 1993 order. Shortly thereafter, on May 17, 1994, appellant commenced a new, separate action in the Chancery Division asserting the same regulatory taking claim he had raised in the third party complaint. *Bell v. New Jersey Dep't of Envtl Protection,* No. A-1842-94T3 (the declaratory judgment action).

On June 14, 1994, appellant opposed the DEP's enforcement motion at oral argument, again asserting he was entitled to a hearing on his regulatory takings claim. The Chancery Division judge denied appellant relief and entered an order on September 28, 1994 (the enforcement order), granting the DEP's application to enter the property and remove appellant's billboards and pilings and directing appellant to pay the costs arising therefrom. On October 28, 1994, the judge denied appellant's motion for a stay and certified the enforcement order as a final order pursuant to *R.* 4:42-2.

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[7] The record reflects we deemed the matter interlocutory because the judge did not award the DEPE's request for monetary penalties or attorneys' fees and thus, these claims were still pending.

On October 31, 1994, appellant filed a notice of appeal and an emergent application in this court seeking a stay of the enforcement order pending both the appeal and the disposition of the declaratory judgment action. Both the Supreme Court and this court denied appellant the emergent applications for a stay.

On appeal of the enforcement order, appellant reasserts his claim that the wetlands regulations effectuate an unconstitutional taking of his property and that, during the administrative proceedings in 1984, he reserved his right to raise this claim at a later time. Appellant also argues again that the DEP's rejection of his "re-application" for a wetlands permit in 1986 was improper and reasserts his claim that the wetlands regulations violate his constitutional right of free speech.

As earlier noted, on May 17, 1994, appellant filed the declaratory judgment action in the Chancery Division against the DEP and the Township of Stafford pursuant to *N.J.S.A.* 13:9A-6, again asserting that the 1984 DEP order "denying [him] . . . permission to erect billboards" on his property constituted a "taking without compensation." On November 18, 1994, the Chancery Division judge dismissed the complaint with prejudice under the entire controversy doctrine.

On appeal of the dismissal of his declaratory judgment action, appellant maintains his "regulatory taking" claim is timely despite the limitations period in *N.J.S.A.* 13:9A-6.[8] In essence, his position is that the ninety-day limitations period for filing a takings claim

---

[8] Although the Chancery Division judge did not decide the limitations issue, we exercise our original jurisdiction to consider and decide the issue because the question as to whether appellant is barred from asserting his "regulatory takings" claim pursuant to *N.J.S.A.* 13:9A-6 has been fully briefed.

was revived and began to run anew each time an administrative or judicial body entered an order affecting his billboards. We disagree.

N.J.S.A. 13:9A-6 provides in relevant part:

> Any person having a recorded interest in land affected by any . . . order or permit [issued pursuant to The Wetlands Act of 1970, *N.J.S.A.* 13:9A-1 to 10 (the Wetlands Act)], may, *within 90 days* after receiving notice thereof, file a complaint in the Superior Court to determine whether such order or permit so restricts or otherwise affects the use of his property as to deprive him of the practical use thereof and is therefore an unreasonable exercise of the police power because the order or permit constitutes the equivalent of a taking without compensation. . . .
>
> The method provided in this section for the determination of the issue *shall be exclusive,* and such issue *shall not be determined in any other proceeding.* (emphasis added)

This statute sets forth the procedure for asserting a constitutional regulatory takings claim resulting from the enforcement of the Wetlands Act. *Sands Point Harbor, Inc. v. Sullivan,* 136 *N.J. Super.* 436, 441 (App. Div. 1975). The statute is triggered when the Commissioner of the DEP promulgates a wetlands order potentially depriving a claimant of the use of his property. *Loveladies Property Owners Ass'n v. Raab,* 137 *N.J. Super.* 179, 183 (App. Div. 1975).

The plain language of the statute requires a claimant to file its takings claim in the Superior Court "within 90 days" of the Commissioner's order, and further provides that this statutory method for filing such a claim "shall be [the] exclusive" method and that the claim "shall not be determined in any other proceeding."

Because this statute "is clear and unambiguous on its face and admits of only one interpretation, we need delve no deeper than [its] literal terms to divine the Legislature's intent. Absent a legislative intent to the contrary, such language is to be given its ordinary meaning." *GE Solid State, Inc. v. Director, Div. of Taxation*, 132 *N.J.* 298, 307 (1993).

Here, the DEP entered its order denying appellant's application for a wetlands permit on August 2, 1984. This court affirmed that decision in 1985 and ordered the removal of the billboards. Plaintiff failed to comply which necessitated numerous efforts to compel his compliance. Appellant did not file his takings claim within ninety days of either the DEP order or our decision affirming that order in the Superior Court, as required, "to determine the extent to which and the purposes for which its lands may be used." *Sands Point Harbor, Inc., supra*, 136 *N.J. Super.* at 441. In April 1986 when, according to appellant, the DEP again denied him relief, appellant did not file his takings claim in the Superior Court within ninety days of that rejection either. Instead, in 1987, he filed his regulatory takings claim in the United States District Court under the rubric of a §1983 action. In 1989, after consenting to a dismissal of the claim in federal court, he reasserted his takings claim in the Chancery Division as part of his third party complaint. After this court dismissed appellant's constitutional claims and the Chancery Division judge dismissed the third party complaint, appellant commenced his declaratory judgment action in 1994 advancing the identical claim. We conclude appellant's takings claim is barred by the limitations period contained in *N.J.S.A.* 13:9A-6.

Appellant should have filed the regulatory takings claim within ninety days of the DEP's final decision. He clearly was aware of it for he "reserved" his right to assert it during the hearing before the ALJ. Assuming there might be an equitable basis for tolling the limitations period until the appeal process had concluded, at the very least appellant should have filed his claim within ninety days of our decision in 1985. Instead, the record clearly reflects that the next challenge to the DEP's denial of a permit was when appellant instituted his §1983 claim in the United States District Court in 1987. By then, the limitations period had long expired.

The limitations problem aside, appellant's takings claim is barred by the entire controversy doctrine. Appellant should have raised his takings claim before this court in 1993 after the Chancery Division judge transferred his "constitutional claims" to this court. All parties to an action are required to raise in one proceeding "all of their claims and defenses that are related to the underlying controversy." *Cogdell v. Hospital Center at Orange,* 116 *N.J.* 7, 15-17 (1989). "[T]he adjudication of a legal controversy should occur in one litigation in only one court." *Ibid.*

At the very least, in 1991 when the Chancery Division judge transferred the constitutional claims to this court, appellant should have disclosed to us that the third party complaint contained a regulatory takings claim as well as the substantive due process and free speech claims. Appellant's failure to do so resulted in a fragmentation of his constitutional claims which is prohibited by the entire controversy doctrine. His failure to make such disclosure deprived this court of an opportunity to consider his claim of entitlement to a hearing pursuant to *N.J.S.A.* 13:9A-6.

"[T]he entire controversy doctrine applies not only to matters actually litigated, but to all aspects of a controversy that *might* have been thus litigated and determined." *Mori v. Hartz Mountain Dev. Corp.*, 193 *N.J. Super.* 47, 56 (App Div. 1983) (emphasis added). Consequently, "the application of the doctrine requires that a party who has elected to hold back from the first proceeding a related component of the controversy be barred from thereafter raising it in a subsequent proceeding. It is only that bar which can effectively prevent the evil of . . . piecemeal litigation of fragments of a single controversy." *William Blanchard Co. v. Beach Concrete Co., Inc.* 150 *N.J. Super.* 277, 292-93 (App. Div.), *certif. denied*, 75 *N.J.* 528 (1977) (citations omitted). Furthermore, "[w]hether or not the present matters were intentionally withheld for tactical reasons or inadvertently omitted, the result must be the same." *Malaker Corp. Stockholders Protective Comm. v. First Jersey Nat'l Bank*, 163 *N.J. Super.* 463, 500 (App. Div. 1978), *certif. denied*, 79 *N.J.* 488 (1979).

Nonetheless, even if appellant had raised the regulatory takings claim before us, possibly satisfying the entire controversy doctrine, we would have concluded, in any event, that defendant was barred by the ninety-day limitations period contained in the statute. Accordingly, our review of the record persuades us that under the entire controversy doctrine the Chancery Division judge did not err in dismissing appellant's regulatory takings claims as set forth in both the third party complaint and the declaratory judgment action.

We also reject appellant's argument that the DEP improperly denied his reapplication for a wetlands permit in 1986. Appellant did not appeal that rejection through

either the administrative process or by filing an appeal in this court. Having never been litigated below, and given its belated assertion here, there is no basis for us to even consider the claim.

Finally, we conclude appellant's argument that the DEP order and underlying wetlands regulations deprived him of his right of free speech is the same claim he raised in the Chancery Division in 1989 and which this court dismissed on entire controversy grounds in 1993. As such, appellant is precluded from again raising this issue under the law-of-the-case doctrine. *State v. Hale,* 127 *N.J. Super.* 407, 410 (App. Div. 1974) (observing that " '[l]aw of the case' most commonly applies to the binding nature of appellate decisions . . . upon a different appellate panel which may be asked to reconsider the same issue in a subsequent appeal").

Affirmed.

I hereby certify that the
foregoing is a true copy of the
original on file in my office.

/s (Illegible)
Clerk

Order of Superior Court of New Jersey, Chancery Division, Dated September 28, 1994

RECEIVED & FILED
SEP 28 1994
(Illegible)

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION—OCEAN COUNTY
DOCKET NO. C-1412-88

Civil Action
ORDER FOR SPECIFIC ACTS
PURSUANT TO *R.* 4:59-2

DEBORAH T. PORITZ
ATTORNEY GENERAL OF NEW JERSEY
Attorney State Third Party Defendants
R.J. Hughes Justice Complex
CN 093
Trenton, New Jersey 08625

By: ALICE B. CESARETTI
Deputy Attorney General
(609) 292-1557

LINCOLN PROPERTY CO. NO. 70, A General Partnership of the State of New Jersey, WILLIAM F. TYNAN, JAY CRANMER, TRAMMEL CROW, ERIC EICHLER, ROBERT F. WALKER, Partners,

Plaintiffs,

v.

WESLEY K. BELL, A Married Man,

Defendant-Counterclaimant & Third Party Plaintiff,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, COMMISSIONER OF ENVIRONMENTAL PROTECTION & TOWNSHIP OF STAFFORD, DALE LESSNE, PHILIP SANDINE, JOHN R. WEINGART, ANTHONY SCOPPETUOLO, ROBERT PEIL, JR., STEVEN WHITNEY, and KATHLEEN M. CANN, Individually and in his/her official capacity as an official of the Department of Environmental Protection,

Third Party Defendants.

THIS MATTER having been opened to the Court by way of motion for relief to litigant pursuant to *R.* 1:10-5, by Deborah T. Poritz, Attorney General of New Jersey, attorney for State Third Party Defendants, Alice B. Cesaretti, Deputy Attorney General, appearing, upon notice to Third Party Plaintiff, Wesley K. Bell, appearing, and the Court having entered a Summary Judgment Dismissing Third Party Plaintiff's Complaint on October 8, 1993, which ordered Third Party Plaintiff to remove, within 60 days, all billboards and pilings erected in violation of the Wetlands Act of 1970, *N.J.S.A.* 13:9A-1 to -10, on real property located in wetlands on the southern side of Route 72, Lot 114, Block 147A, Stafford Township, Ocean County, New Jersey and to restore the property to its pre-violation condition and the Court having considered the briefs and supporting documents submitted and the arguments presented by the parties on June 14, 1994, and the Court having found that Third Party Plaintiff has willfully disobeyed the October 8, 1993 Judgment entered by this Court, and it appearing to the Court and for good cause shown;

IT IS on this 28 day of Sept. 1994,

ORDERED that:

1. The New Jersey Department of Environmental Protection and Energy (DEPE) is hereby granted access, after 30 days of the entry of this order, to the real property designated as Lot 114, Block 147A, Stafford Township, Ocean County, New Jersey, for the purpose of the removal of all billboards and pilings erected in wetlands in violation of the Wetlands Act of 1970, *N.J.S.A.* 13:9A-1 to -10.

2. DEPE and its agents, employees or contractors may remove the illegal billboards and restore the property to its pre-violation condition.

3. When the removal and restoration is complete, DEPE shall submit a bill to Third Party Plaintiff who shall immediately reimburse DEPE for all costs incurred.

4. A copy of this Order be served upon Third Party Plaintiff, Wesley K. Bell, within _____ days in accordance with *R.* 1:5-2.

s/ WILLIAM H. HUBER
William H. Huber
(Retired and temporarily
assigned on Recall)

Pursuant to *R.* 1:6-2(a), this motion was
_____ opposed _____ unopposed.

Order of Superior Court of New Jersey, Chancery Division, Dated October 28, 1994

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION—OCEAN COUNTY
DOCKET NO. C-1412-88

RECEIVED & FILED
OCT 28 1994
M. DEAN HAINES

ORDER

LINCOLN PROPERTY CO. NO. 70, A General Partnership of the State of New Jersey, WILLIAM F. TYNAN, JAY CRANMER, TRAMMEL CROW, ERIC EICHLER, ROBERT F. WALKER, Partners,

Plaintiffs,

v.

WESLEY K. BELL, A Married Man,

Defendant, Counterclaimant, Third Party Plaintiff-Appellant,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, COMMISSIONER OF ENVIRONMENTAL PROTECTION & TOWNSHIP OF STAFFORD, DALE LESSNE, PHILIP SANDINE, JOHN R. WEINGART, ANTHONY SCOPPETUOLO, ROBERT PEIL, JR., STEVEN WHITNEY, and KATHLEEN M. CANN, Individually and in his/her official capacity as an official of the Department of Environmental Protection,

Third Party Defendants-Respondents.

An ORDER was entered in the above entitled matter on Sept 28th 1994 and Third Party Plaintiff had requested certain relief in his moving papers and at the hearings, and it appearing to the Court and for good cause shown;

IT IS on this 28 day of October, 1994

ORDERED THAT:

1. The Order dated Sept 28th 1994 is STAYED FURTHER until Nov 1, 1994 for the purpose of giving the Appellate Division an opportunity to consider an appeal request for a Stay.

2. A STAY of the ORDER of September 28th 1994 is _____ (approved) X (denied).

3. The ORDER dated September 28th 1994 X (is) _____ (is not) a FINAL ORDER pursuant to RULE 4:42-2.

s/ WILLIAM H. HUBER
WILLIAM H. HUBER, P. J. Ch.
(Retired and temporarily
assigned on Recall)

Order of Superior Court of New Jersey, Appellate Division, Dated March 25, 1993

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4870-90T2

FILING DATE
APPELLATE DIVISION
MAR 25 1993
(ILLEGIBLE)
Clerk

MAR 26 1993

LINCOLN PROPERTY CO. NO. 70, A General Partnership of the State of New Jersey, WILLIAM F. TYNAN, JAY CRANMER, TRAMMEL CROW, ERIC EICHLER, ROBERT F. WALKER, Partners,

Plaintiffs,

v.

WESLEY K. BELL, A Married Man,

Defendant, Counterclaimant, Third Party Plaintiff-Appellant,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, COMMISSIONER OF ENVIRONMENTAL PROTECTION & TOWNSHIP OF STAFFORD, DALE LESSNE, PHILIP SANDINE, JOHN R.

WEINGART, ANTHONY SCOPPETUOLO, ROBERT PEIL, JR., STEVEN WHITNEY, and KATHLEEN M. CANN, Individually and in his/her official capacity as an official of the Department of Environmental Protection,

Third Party Defendants-Respondents.

Argued March 2, 1993—Decided MAR 25 1993

Before Judges Bilder, Baime and Wallace.

On appeal from State of New Jersey, Department of Environmental Protection.

Lewis H. Robertson argued the cause for appellant (Evans, Osborne & Kreizman, attorneys; Mr. Robertson, on the brief).

Carol A. Blasi, Deputy Attorney General, argued the cause for respondents (Robert J. Del Tufo, Attorney General, attorney; Mary C. Jacobson, Deputy Attorney General, of counsel; Alice B. Cesaretti, Deputy Attorney General, on the brief).

PER CURIAM

N.J.A.C. 7:7A-1.5, now recodified as *N.J.A.C.* 7:7E-3.27, bars the Department of Environmental Protection and Energy (DEPE) from issuing a wetlands permit if the proposed activity can prudently or feasibly be conducted on a non-wetlands site. The regulatory exclusion applies even where the projected development would only minimally impair the natural contour or vegetation of the wetlands area. In 1984, the DEPE denied appellant's application for a permit to erect commercial billboards on its wetlands property on the basis that the proposed activity could feasily be conducted on nearby alternative non-wetlands sites. Appellant appealed to this court, claiming that the

DEPE's findings were not supported by sufficient credible evidence present in the record and asserting that its conclusions were arbitrary and capricious. We affirmed in an unreported opinion. In subsequent litigation in the Chancery Division, appellant, claiming a deprivation of his civil rights under 42 *U.S.C.* §1983, challenged the constitutionality of the regulation and sought compensatory damages. The Chancery Division retained jurisdiction over portions of the suit, but transferred the constitutional attack upon the regulation to this court pursuant to *R.* 1:13-4(a) and *R.* 2:2-3(a)(2). Before us, appellant contends that the regulation is *ultra vires* and violative of substantive due process and freedom of speech. We hold that appellant's claim is barred by the entire controversy doctrine.

I.

We need not recount at length the convoluted procedural history. The salient facts can be summarized briefly. In 1982, appellant filed a "Type A" wetlands permit application with the DEPE, proposing construction of additions to three billboards erected prior to the promulgation of the wetlands delineation map. In addition, appellant sought permission to install pilings for several double-faced billboards. Later that year, the DEPE inspected the property, which was at that time, owned by Lincoln Property Co. (Lin Pro), and found that billboards had been erected in vioaltion of the regulation. Lin Pro advised the DEPE that it had forwarded its complaint to appellant who had possession of the property and who was under contract to purchase it. Following a hearing before an administrative law judge, the DEPE denied appellant's permit application. In

taking this action, the DEPE adopted portions of the ALJ's initial decision. The denial was based upon *N.J.A.C.* 7:7A-1.5,[1] which provided:

> (a) The Commissioner shall review the filed application and shall issue a Type A permit only if he finds that the proposed activity:
>
> (i) is Type A activity and the application is complete;
>
> (ii) requires water access or is water-oriented as a central purpose of the basic function of the activity;
>
> (iii) has no prudent or feasible alternative on a non-wetlands site;
>
> (iv) will result in minimum feasible alteration or impairment of natural tidal circulation;
>
> (v) will result in minimum feasible alteration or impairment of natural contour or the natural vegetation of the wetlands.

The DEPE determined that all of the criteria contained in the regulation must be satisfied as a prerequisite to issuance of a permit. Although appellant had established

---

[1] During the course of this litigation, *N.J.A.C.* 7:7A-1.5 was recodified with changes as *N.J.A.C.* 7:7E-3.27(b) which provides:

> In general, development of all kinds is prohibited in Wetlands, unless the Department can find that the proposed development meets the following four conditions (see also *N.J.A.C.* 7:7-2.2):
>
> 1. Requires water access or is water-oriented as a central purpose of the basic functon of the activity (this policy applies only to development proposed on or adjacent to waterways). This means that the use must be water dependent as defined in *N.J.A.C.* 7:7E-1.5.
>
> 2. Has no prudent or feasible alternative on a non-wetland site;
>
> 3. Will result in minimum feasible alteration or impairment of natural tidal circulation (or natural circulation in the case of non-tidal wetlands); and
>
> 4. Will result in minimum feasible alteration or impairment of natural contour or the natural vegetation of the wetlands.

that erection of the billboards would only minimally impact upon the natural contour and vegetation of the property, the DEPE found that the proposed activity was not water-oriented and could feasibly be conducted on nearby non-wetlands sites. While conceding that these other sites, located along Route 9, did not have the same commercially desirable characteristics the DEPE concluded that the absence of a prudent and feasible alternative to the wetland property had not been shown.

Appellant filed a direct appeal. Although phrased in a variety of ways, appellant asserted that no feasible non-wetlands site was available and that the DEPE's contrary conclusion was arbitrary and capricious. We found no merit in these contentions and affirmed the DEPE's determination. No petition for certification was filed.

Instead, on April 9, 1986, appellant submitted another "Type A" wetlands permit application in which it sought to legalize the existing billboard structures and install additional pilings. The DEPE subsequently returned appellant's application and fee. In its accompanying letter, the DEPE noted that the application was substantially the same as the one that had been denied previously. No appeal was taken from this disposition.

In a somewhat desultory fashion, the DEPE attempted to secure appellant's compliance with its administrative order. We need not describe in detail the DEPE's efforts in that regard. Suffice it to say, Lin Pro felt sufficiently threatened by these actions to institute a suit in the Chancery Division to compel appellant to remove the billboards. Appellant filed an answer and a third-party complaint, naming the DEPE, its commissioner, and the Township of Stafford, and

asserting among other things that the regulation was unconstitutional. As we mentioned earlier, this issue was subsequently transferred to this court. The portions of the suit that remain in the Chancery Division have been stayed pending disposition of this appeal.

II.

The point to be stressed is that appellant never challenged the constitutionality of *N.J.A.C.* 7:7A-1.5 in prior administrative and judicial proceedings. At no time during the administrative appeal process or in the appeal to this court did appellant raise the issue of the constitutionality of the regulation. Nor did he petition for certification to the Supreme Court from our 1985 decision. Instead, appellant was content to maintain the billboards on the wetlands site and challenge in piecemeal fashion the DEPE's efforts to remove them. Under these circumstances, we will not entertain appellant's belated constitutional attack upon the validity of the regulation.

New Jersey has adopted a strong policy in favor of the adjudication of all components of a legal controversy at one time in one litigation. Accordingly, all parties involved in a litigation should at the very least present in that proceeding all the claims and defenses that are related to the underlying controvery. *See Cogdell v. Hospital Center at Orange,* 116 *N.J.* 7, 15-16 (1989); *Aetna Ins. Co. v. Gilchrist Brothers, Inc.,* 85 *N.J.* 550, 556-57 (1981); *Applestein v. United Board & Carton Corp.,* 35 *N.J.* 343, 356-57 (1961); *Vacca v. Stika,* 21 *N.J.* 471, 476 (1956); *Ajamian v. Schlanger,* 14 *N.J.* 483, 488-89, *cert. denied,* 348 *U.S.* 835, 75 *S.Ct.* 58, 99 *L.Ed.* 659 (1954). The doctrine has been established by both case law and court rule, *see Cogdell v. Hospital Center at*

Orange, 116 *N.J.* at 17; *R.* 4:27-1(b), and requires that a person assert all related claims against an adversary, including all affirmative defenses, counterclaims and cross-claims, or be estopped from later asserting an omitted component, *Aetna Ins. Co. v. Gilchrist Brothers, Inc.*, 85 *N.J.* at 556-57. The entire controversy, rather than its constituent causes of action, is the relevant unit of litigation. *The Malaker Corp. v. First Jersey National Bank*, 163 *N.J. Super.* 463, 496 (App. Div. 1978), *certif. denied*, 79 *N.J.* 488 (1979). Joinder of all causes of action and defenses is compulsory under penalty of forfeiture. *Ibid.* A plaintiff must seek complete relief for vindication of the wrong he charges and a defendant must assert all matters which will defeat the claims against him. *Ibid.*

In assessing the parameters of a single controversy, we are obliged to consider each potential component and "determine the likely consequences" of its omission and "its reservation for litigation another day." *Wm. Blanchard Co. v. Beach Concrete Co., Inc.*, 150 *N.J. Super.* 277, 293 (App. Div.), *certif. denied*, 75 *N.J.* 528 (1977). If those consequences are that the litigants, after final judgment, are likely to renew their dispute in additional litigation in order to conclusively dispose of their respective "bundle of rights and liabilities," then the policies underlying the entire controversy doctrine have been thwarted. *Id.* at 293-94. The essential point is that a component of the controversy may not be unfairly withheld. "[B]y definition, [a withholding is] unfair if its effect is to render the pending litigation merely one inning of the whole ball game." *Id.* at 294.

The entire controversy doctrine serves the aim of avoiding delay, expense and waste incident to the fragmentation of litigation. It promotes efficiency and fairness to the parties, prevents harassment, and avoids

congestion in court calendars. "A disposition that reflects only a partial glimpse of the merits, . . . or that resolves only a segment of the controversy does not fully effectuate the judicial ideal of complete, not piecemeal, adjudications." *Cogdell v. Hospital Center of Orange*, 116 *N.J.* at 23. The doctrine has become such a fundamental aspect of judicial administration, "it has achieved constitutional confirmation." *Id.* at 15; *see N.J. Const.* art. VI, §2, ¶4. We have no occasion here to trace the constitutional evolution of the doctrine. Rather, we merely observe that the rule currently encompasses mandatory joinder of "virtually all causes, claims, and defenses relating to a controversy between the parties engaged in litigation." *Cogdell v. Hospital Center at Orange*, 116 *N.J.* at 16.

Application of the doctrine is not confined to judicial proceedings. The doctrine "has become such an integral and component part of this state's approach to the resolution of disputes or controversies that it has been held generally applicable in the field of administrative law." *Crispin v. Volkswagenwerk, A.G.*, 96 *N.J.* 336, 350 (1984), *appeal after remand*, 248 *N.J. Super.* 540 (App. Div.), *certif. denied*, 126 *N.J.* 385 (1991); *see also Thornton v. Potamkin Chevrolet*, 94 *N.J.* 1, 5 (1983); *City of Hackensack v. Winner*, 82 *N.J.* 1, 31-33 (1980); *Hinfey v. Matawan Regional Board of Education*, 77 *N.J.* 514, 532 (1978). "It has been recognized that the underlying principles of the doctrine—'finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination of conflicts, confusion and uncertainty; and basic fairness'—have a central place in the adjudication of all legal controversies." *Crispin v. Volkswagenwerk, A.G.*, 96 *N.J.* at 350-51 (quoting *City of Hackensack v. Winner*, 82 *N.J.* at 32-33).

The entire controversy doctrine "is equitable in nature," *Jersey City Police v. Jersey City*, 257 *N.J. Super.* 6, 13 (App. Div. 1992), and is fundamentally predicated upon "judicial fairness," *Crispin v. Volkswagenwerk, A.G.*, 96 *N.J.* at 343. "[I]ts application requires, as a matter of first principle, that the party whose claim is being sought to be barred must have had a fair and reasonable opportunity to have fully litigated that claim in the original action." *Cafferata v. Peyser*, 251 *N.J. Super.* 256, 261 (App. Div. 1991); *see also Jersey City Policy v. Jersey City*, 257 *N.J. Super.* at 13.

Appellant seeks to bring himself within this exception on the ground that his constitutional claim was inchoate until the DEPE rendered its final decision, concluding that all of the criteria set forth in *N.J.A.C.* 7:7A-1.5 had to be satisfied as a prerequisite to the issuance of a permit. In other words, appellant claims that his constitutional attack upon the regulation was triggered by the DEPE's final decision in which it determined that the regulatory criteria were to be applied conjunctively; *i.e.*, an application must be denied if an alternative feasible site exists even though the proposed activity impacts only slightly on wetlands concerns. It is argued that the regulation, so construed, is *ultra vires* because it subverts the legislative policy underlying the Wetlands Act of 1970 (*N.J.S.A.* 13:9A-1 through -10), *see In re Amendment of N.J.A.C. 8:31B-3.31*, 119 *N.J.* 531, 545-46 (1990); *Matter of Warren*, 117 *N.J.* 295, 296-97 (1989); *Last Chance Development v. Kean*, 232 *N.J. Super.* 115, 127-28 (App. Div. 1989), *aff'd*, 119 *N.J.* 425 (1990), violates substantive due process because it has no substantial relation to the public health, safety, morals or general welfare, *see Moore v. City of East Cleveland*, 431 *U.S.* 494, 520, 97 *S.Ct.* 1932, _____, 52 *L.Ed.*2d 531, 550 (1977); *Kirsch Holding Co. v.*

Borough of Manasquan, 59 *N.J.* 241, 251 (1971), and contravenes free speech because it bars commercial communication and is not narrowly tailored to achieve a legitimate governmental goal, *see Metromedia, Inc. v. San Diego*, 453 *U.S.* 490, 508, 101 *S. Ct.* 2882, _____, 69 *L.Ed.*2d 800, 815 (1981). According to appellant, these claims could only be advanced after the DEPE rendered its final decision.

We find this analysis flawed for several reasons. As we noted previously, the DEPE adopted much of the ALJ's findings and conclusions. Specifically, the ALJ determined that a permit application was to be denied under the regulation if an alternative non-wetland site was feasible even though the proposed activity had only a *de minimis* effect on wetlands concerns. This interpretation of the regulation is the predicate for all of appellant's constitutional claims. Thus, upon receipt of the ALJ's initial decision, appellant knew all he needed to know to raise the arguments he now advances. Possessing this knowledge, appellant did not raise the issue before the DEPE Commissioner.

Appellant asserts that the DEPE was wholly without jurisdiction to adjudicate his constitutional claims. The short answer to this argument is that an administrative agency can resolve constitutional issues, even though that resolution carries no presumption of correctness on appellate review. *See Abbott v. Burke*, 100 *N.J.* 269, 298-99 (1985), *appeal after remand*, 119 *N.J.* 287 (1990); *Hunterdon Cent. High Sch. v. Hunterdon Cent. High*, 174 *N.J. Super.* 468, 475 (App. Div. 1980), *aff'd o.b.*, 86 *N.J.* 43 (1981). A constitutional challenge to a statute or regulation should be initially presented to the administative agency for adjudication to ensure an adequate factual record. *See Abbott v. Burke*, 100 *N.J.* at

299; *Christian Bros. Inst. v. No. N.J. Interschol. League*, 86 *N.J.* 409, 415-16 (1981); *Paterson Redevelopment Agency v. Schulman*, 78 *N.J.* 378, 386-88, *cert. denied*, 444 *U.S.* 900, 100 *S.Ct.* 210, 62 *L.Ed.*2d 136 (1979); *The Presbyterian Homes v. Division of Tax Appeals*, 55 *N.J.* 275, 289 (1970); *Ocean Cablevision Associates v. Hovbilt, Inc.*, 210 *N.J. Super.* 626, 634-35 (Law Div. 1986).

In any event, appellant's constitutional claims were clearly ripe for resolution when he appealed to this court from the denial of his permit application. Appellant could have challenged the constitutionality of the regulation and sought damages for deprivation of his civil rights in this court. Of course, we would have remanded the civil rights claim to either the Law Division or the Chancery Division, but we would have retained jurisdiction over the attack upon the regulation. The simple and overriding fact is that appellant chose to withhold his constitutional claims. We need not speculate upon his motives. The point is that, by holding back a component of his claim, appellant improperly fractionalized the litigation, presumably to the public's detriment.

Under these circumstances, we will not entertain appellant's attack upon the constitutionality of the regulation. Accordingly, this appeal is dismissed.

I hereby certify that the
foregoing is a true copy of the
original on file in my office.

ILLEGIBLE
Clerk

Order of Superior Court of New Jersey, Chancery Division, Dated October 8, 1993

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
DOCKET NO. C-1412-88

RECEIVED & FILED
OCT 8 1993
M. DEAN HAINES
DEPUTY CLERK
SUPERIOR CT. OCEAN CO.

ROBERT J. DEL TUFO
ATTORNEY GENERAL OF NEW JERSEY
Attorney for State Third Party Defendants
Hughes Justice Complex
CN 093
Trenton, New Jersey 08625

By: Alice B. Cesaretti
Deputy Attorney General
(609) 292-1509

Civil Action

SUMMARY JUDGMENT DISMISSING
THIRD PARTY PLAINTIFF'S COMPLAINT

LINCOLN PROPERTY CO. NO. 70, A General Partnership of the State of New Jersey, WILLIAM F. TYNAN, JAY CRANMER, TRAMMEL CROW, ERIC EICHLER, ROBERT F. WALKER, Partners,

Plaintiffs,

v.

WESLEY K. BELL, A Married Man,
Defendant, Counterclaimant, & Third Party Plaintiff,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, COMMISSIONER OF ENVIRONMENTAL PROTECTION & TOWNSHIP OF STAFFORD, DALE LESSNE, PHILIP SANDINE, JOHN R. WEINGART, ANTHONY SCOPPETUOLO, ROBERT PEIL, JR., STEVEN WHITNEY, and KATHLEEN M. CANN, Individually and in his/her official capacity as an official of the Department of Environmental Protection,

Third Party Defendants.

THIS MATTER having been opened to the Court by way of motion by Robert J. Del Tufo, Attorney General of New Jersey, Alice B. Cesaretti, Deputy Attorney General, appearing on behalf of Third Party Defendants, State of New Jersey, Department of Environmental Protection, Commissioner of Environmental Protection Dale Lessne; Phillip Sandine, John R. Weingart, Robert Peil Jr., Steven Whitney and Kathleen M. Cann (the State), upon notice to Third Party Plaintff, Wesley K. Bell, Lewis H. Robertson, Esq. appearing, and upon notice to Third Party Defendant, Township of Stafford, Thomas E. Monahan, Esq., appearing, and the Court having considered the briefs submitted and having heard the arguments of counsel and having made oral conclusions of law on June 11, 1993, and for good cause shown:

IT IS on this 8 day of October, 1993:

ORDERED that:

1. The Complaint of Third Party Plaintff, Wesley K. Bell, is hereby dismissed, pursuant to *R.* 4:46-2, with prejudice.

2. Within seven days of the entry of this order, third party plaintiff pay administrative penalties to the New Jersey Department of Environmental Protection and Energy in the amount of $ pursuant to the Wetlands Act of 1970, *N.J.S.A.* 13:9A-9, including pre-judgment and post-judgment interest.

3. Within ~~seven~~ (60) days of the entry of this order, third party plaintiff remove and properly dispose of all structures, including billboards and pilings, erected in violation of the Wetlands Act of 1970, *N.J.S.A.* 13:9A-1 to -10, on real property located in wetlands on the southern side of Route 72 on Lot 114, Block 147A, Stafford Township, Ocean County, New Jersey.

4. Within ~~seven~~ (60) days of the entry of this order, third party plaintiff restore Lot 114, Block 147A of Stafford Township to its previous pre-violation condition subject to full approval of the New Jersey Department of Environmental Protection and Energy.

5. Third party plaintiff immediately post a band with this Court in the amount of $ sufficient to cover the costs of restoration of Lot 114, Block 147A of Stafford Township, *N.J.S.A.* 13:9A-9.

6. Within seven days of the entry of this order, third party plaintiff pay attorneys' fees in the amount of $ to the New Jersey Department of Environmental Protection and Energy.

s/ WILLIAM H. HUBER, J.S.C.
William H. Huber, P.J. Ch.
(Retired and temporarily assigned on Recall)

Pursuant to *R.* 1:6-2(a) this motion was
opposed _____ unopposed _____.

Order of Superior Court of New Jersey, Law Division, Dated October 12, 1993

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—OCEAN COUNTY

DOCKET NO. C-1412-88

CIVIL ACTION

RECEIVED
OCT 14 1993
GILMORE & MONAHAN

RECEIVED & FILED
OCT 12 1993
M. DEAN HAINES
DEPUTY CLERK
SUPERIOR CT., OCEAN CO.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

GILMORE & MONAHAN, P.A.
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LINCOLN PROPERTY CO. NO. 70, A General Partnership of the State of New Jersey, WILLIAM F. TYNAN, JAY CRANMER, TRAMMEL CROW, ERIC EICHLER, ROBERT F. WALKER, Partners,

Plaintiffs,

v.

WESLEY K. BELL, A Married Man,

Defendant, Counterclaimant, & Third Party Plaintiff,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, COMMISSIONER OF ENVIRONMENTAL PROTECTION & TOWNSHIP OF STAFFORD, DALE LESSNE, PHILIP SANDINE, JOHN R. WEINGART, ANTHONY SCOPPETUOLO, ROBERT PEIL, JR., STEVEN WHITNEY, and KATHLEEN M. CANN, Individually and in his/her official capacity as an official of the Department of Environmental Protection,

Third Party Defendants.

THIS MATTER having been brought before the Court by Thomas E. Monahan, Esq., of the firm of Gilmore & Monahan, P.A., on behalf of the Defendant, Township of Stafford, and Lewis W. Robertson, Esq., of the firm of Evans, Osborne & Kreizman, appearing on behalf of the Third Party Plaintiff, Wesley K. Bell, and Alice B. Cesaretti, Deputy Attorney General, appearing on behalf of Third Party Defendant, State of New Jersey, Department of Environmental Protection, Commissioner of Environmental Protection, Dale Lessne, Phillip Sandine, John R. Weingart, Robert Peil, Jr., Steven Whitney and Kathleen M. Cann (the State), and the Township of Stafford having filed a Notice of Motion for summary judgment and the Court having considered the moving papers, and for good cause having been shown.

IT IS ON THIS 12 day of Oct. 1993 ORDERED as follows:

ORDERED that Summary Judgment be granted to the Township of Stafford on Block 147A, Lot 114.

s/ WILLIAM H. HUBER, J.S.C.
William H. Huber, P.J.Ch.
(Retired and temporarily
assigned on Recall)

Order of the Superior Court of New Jersey, Appellate Division, Dated October 22, 1985

NOT FOR PUBLICATION WITHOUT
THE APPROVAL OF THE COMMITTEE
ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1074-84T6

ORIGINAL FILED
OCT 22 1985
ELIZABETH M. LAUGHLIN
Clerk

WESLEY K. BELL t/a
WES OUTDOOR ADVERTISING CO.,
Appellant,

v.

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
Respondent.

Argued October 1, 1985—Decided OCT 22 1985

Before Judges Antell and Matthews.

On appeal from final decision of the Commissioner of the New Jersey Department of Environmental Protection.

Richard M. Hluchan argued the cause for appellant (Sterns, Herbert & Weinroth, attorneys; Mr. Hluchan of counsel and on the brief).

Dale Laster Lessne, Deputy Attorney General, argued the cause for respondent (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; Deborah T. Poritz, Deputy Attorney General, of counsel and Mr. Lessne on the brief).

PER CURIAM

This is an appeal from the final decision of the Department of Environmental Protection dated August 2, 1984 denying appellant's application for a Type A Wetlands permit for the construction of billboards in Block 147A, Lot 114, south of Route 72 in Stafford Township. The agency's regulatory authority is derived from the Wetlands Act, *N.J.S.A.* 13:9A-1, more particularly *N.J.S.A.* 13:9A-4, and appellant's application is governed by *N.J.A.C.* 7:7E-3.26(b), which was promulgated thereunder. The determination under review is based upon findings by the Administrative Law Judge and the Commissioner that appellant had failed to demonstrate the absence of any "prudent or feasible alternative on a non-Wetland site" as required by *N.J.A.C.* 7:7E-3.26(b)ii. Also see *N.J.A.C.* 7:7A-1.5.

In accepting the recommended findings and conclusions of the Administrative Law Judge, DEP recognized that the proposed site for appellant's billboards "receives the densest road traffic to and from Long Beach Island, is most attractive to potential advertisers, and most profitable to the licensor of the billboard space." Nevertheless, it concluded that the test of "no prudent or feasible alternative" was not satisfied merely by demonstrating the absence of an "*equivalent* non-Wetlands site." Thus, it reasoned that although appellant may have demonstrated the lack of other locations having the same commercially desirable characteristics, the absence of prudent and feasible

alternatives had not been shown. It specifically took note of the fact that appellant "acknowledged that on Route 9, an admittedly lesser desirable location, sites might be available although at an excessively higher rental than [appellant] feels is appropriate." We conclude that the decision of the Administrative Agency is supported by sufficient credible evidence on the record as a whole, taking into account agency expertise and its opportunity to see and hear the witnesses. *Close v. Kordulak Bros.*, 44 *N.J.* 589, 599 (1965).

Appellant further argues as a reason for reversal the fact that DEP issued a Type A Wetlands permit to a different applicant in 1979 under circumstances closely comparable to these. Nevertheless, we conclude that the doctrine of *stare decisis* does not compel a different result. *See Tewksbury Tp. v. Jersey Cent. Power & Light*, 159 *N.J. Super.* 44, 47b (App. Div. 1978), aff'd 79 *N.J.* 398 (1979). Moreover, the difference in treatment accorded a single prior applicant does not demonstrate that the denial of appellant's application was discriminatory.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

ELIZABETH M. LAUGHLIN

Initial Decision of the Office of Administrative Law, State of New Jersey, Dated June 20, 1984

(SEAL)
State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

N.J.Sup.Ct.
DOCKET 42,786

INITIAL DECISION
OAL DKT. NO. ESA 3531-83
AGENCY DKT. NO. 83-26

RECEIVED
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SUPREME COURT
CLERK'S OFFICE

WESLEY BELL, t/a
WES OUTDOOR ADVERTISING,

Petitioner,

v.

DIVISION OF COASTAL RESOURCES,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondent.

APPEARANCES:

Richard Hluchan, Esq., on behalf of petitioner (Sterns, Herbert and Weinroth, attorneys)

Dale Laster Lessne, Deputy Attorney General, on behalf of respondent (Irwin I. Kimmelman, Attorney General of New Jersey, attorney)

Record Closed: May 11, 1984 Decided: June 20, 1984

BEFORE STEVEN C. REBACK, ALJ:

STATEMENT OF THE CASE

The petitioner, Wesley Bell, trading as Wes Outdoor Advertising, is appealing the denial issued on April 4, 1983, by the Department of Environmental Protection (the Department), Division of Coastal Resources, of his application for a type A permit provided for at *N.J.A.C.* 7:7A-1.4, to construct billboards and to make additions to billboards already constructed on lands designated as wetlands pursuant to the Wetlands Act of 1970, *N.J.S.A.* 13:9A-1 *et seq.*

Mr. Bell had initially undertaken construction work in respect to some of the billboards *prior* to his submission of the permit application. Observations of the work were made by representatives of the Department on December 5, 1982, and the petitioner was informed that work was to cease until the appropriate permit was applied for and granted. Presumably, work thereafter ceased and the petitioner on December 12, 1982, executed an application for the type A permit (R-3), which was received by the Department on December 21, 1982. Because it was deficient, additional information was submitted, which was not received until January 4, 1983.

The wetlands upon which the construction is proposed is located adjacent to Route 172, due west of Long Beach Island, in Stafford Township, Ocean County, New Jersey. Mr. Bell currently holds a contract to purchase the property through 1985.

Petitioner's initial application was for a permit to construct additions to three billboards which predated the promulgation of the wetlands maps and to construct four new billboards, each having a double facing. By letter and summary report dated April 4, 1983 (R-6 and R-5, respectively), the Department denied Mr. Bell's application, concluding that the proposed project failed to meet the regulatory criteria set forth at *N.J.A.C.* 7:7A-1.5. As a consequence, it ordered the petitioner to remove the various structures, pilings, and sediment placed upon the wetlands when he conducted unauthorized construction without the appropriate permit.

By subsequent letter of February 27, 1984, directed to counsel for petitioner by the acting director of the Division of Coastal Resources, the Department indicated that two of the proposed billboards which had initially been included within the denial are located on an area which has since been redesignated as upland, and thus the Department will no longer assert jurisdiction over that area as wetlands (J-1). Accordingly, and for purposes of this proceeding, Mr. Bell's appeal of the permit denial is limited to five billboards, two of which are proposed and three of which require additional reconstruction, all of which are located on the southern side of Route 72 and which, for purposes of clarity have been designated on exhibit P-3 as sites 1 through 5.

PROCEDURAL HISTORY

After receiving notice of the permit denial, Mr. Bell, by letter, requested a hearing on April 26, 1983. A hearing was thereafter granted and the matter was transmitted to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52:14F-1 *et seq.* A

prehearing conference was conducted on July 5, 1983, at which Mr. Bell represented himself, and a Prehearing Order was issued on July 13, 1983. The matter was then originally scheduled to be heard on December 5 through 7, 1983. During the course of the prehearing conference, Mr. Bell indicated a desire to obtain legal representation, and it was agreed that should he do so it would be appropriate for the prehearing conference to be continued.

Prior to the scheduled hearing date, Mr. Hluchan entered his appearance on behalf of petitioner and requested that the prehearing conference be continued so as to afford him the opportunity to acquaint himself with the various legal and factual aspects of the case. To that end, the prehearing conference was continued on December 6, 1983, the issue that was initially expressed in the Prehearing Order was refined, certain discovery matters were addressed, and the hearing was adjourned to March 5 through 7, 1984, inclusive. Thereafter, various discovery motions were made by counsel which were disposed of informally. The case was then heard on March 5, 6 and 7, 1984, at the Office of Administrative Law, Trenton, New Jersey. Because Mr. Bell was hospitalized on those dates, the matter had to be continued to April 2, 1984. Further, on the April 2, 1984 hearing date, counsel for the petitioner formally withdrew the latter's argument, which he initially made *pro se* at the prehearing conference, that denial of the permit results in an unlawful taking of property without compensation.

Both parties thereafter requested the opportunity to submit post-hearing proposed findings of fact and conclusions of law, and accordingly the record was originally scheduled to close April 30, 1984. The deputy

attorney general thereafter made three requests to extend the record closed date because of the unavailability of the transcript of the testimony in this matter, which had been ordered by the Department. Counsel for the respondent did not oppose such extension, and it was granted. It should be noted, however, that the general policy of the Office of Administrative Law is to keep the record open not longer than 30 days from the conclusion of testimony; this policy particulary applies where the reasons for an additional extension is the unavailability of the transcript. Since Ms. Lessne did not initially apprise me of her intention to review the hearing transcript it would have been inappropriate to impose this 30-day policy *after* she had already delayed her submissions. Thus, in the exercise of my discretion and in an effort to provide both sides with a fair and adequate opportunity to argue their cases, the 30-day rule was relaxed. The deputy attorney general's submissions as well as Mr. Hluchan's were received by the Office of Administrative Law on May 11, 1984, the date on which the record in this matter closed.

ISSUES, BURDEN OF PROOF, AND CONCLUSORY STATEMENT

The burden of proof in this matter rests with the petitioner: he must establish by a preponderance of the relevant and credible evidence that the type A permit application which he submitted meets each of the criteria set forth at *N.J.A.C.* 7:7A-1.5.

For the reasons expressed, the determination of the Department denying the petitioner's application for a type A wetlands permit, pursuant to *N.J.A.C.* 7:7A-1.5, is AFFIRMED. Further delineation of the conclusion and the specification of the order is found at the end of this decision.

THE FACTS

The preponderance of the operative and relevant facts in this matter are not in dispute; there are, however, some facts which are at issue and certain conclusions derived from the cumulative facts which are contested. Where those factual disputes persist and where the parties argue antithetical conclusions based upon their interpretation of the facts, I shall address their opposing views, resolve those disputes where they exist, and set forth the reasons in support of my determinations.

Accordingly, I FIND:

Wetlands Defined

The notion of what constitutes wetlands, by necessity, embraces environmental, naturalistic, and biological concerns. Once it was determined that the public policy of New Jersey required their vigorous protection it also became the province of both the legislature and of the executive branch to seek to legally define the "wetlands" for purposes of their regulation and use.

N.J.S.A. 13:9A-2 of the Wetlands Act of 1970, defines "coastal wetlands" as "any bank, marsh, swamp, meadow, flat or other low land and subject to tidal action ... [within an enumerated geographical area] or any inlet, estuary ... whose surface is or at below an elevation of one foot above local extreme high water, and upon which may grow or is capable of growing ... particular kinds of vegetation." The term "tidal wetlands" is also utilized at *N.J.S.A.* 13:9A-1, although not specifically defined, and it has been held that coastal wetlands encompass tidal wetlands. *See, Lovelady's Property Owners Assoc. Inc. v. Rabb*, 137 *N.J. Super.* 179, 185 (1975).

The Department has also reduced the definition of wetlands to regulation at *N.J.A.C.* 7:7E-3.26. It provides as follows:

> "Wetlands" are areas where the substrate is inundated or saturated by surface water of groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions which are subject to the Wetlands Act, or the Coastal Area Facility Review Act (CAFRA) or the Waterfront Development Law.

Mr. Joseph Lomax, who appeared as an expert witness on behalf of the petitioner and whose distinguished credentials will be summarized hereafter, testified in respect to the definition of wetlands. From an empirical perspective, his definition does not diverge from the statutory or regulatory; however, for purposes of an insight into the nature of wetlands and so as to understand how they function and what the public policy of the State is in respect to their protection, Mr. Lomax's perceptions are helpful. He also helped to provide a working vocabulary, which is important in evaluating the nature of wetlands and in determining what impact, if any, intrusion onto them may cause.

Mr. Lomax highlighted several characteristics and properties of the wetlands which help define them. He indicated that wetlands are identifiable when the water within their soils saturates those soils at or near the surface for a sufficient frequency and duration so as to support vegetation which is particularly identifiable on wetland property. Second, he indicated that the development of certain particular kinds of soils which are organic will frequently appear in tidal marshes. Usually they are waterlogged soils and they ultimately build. Thirdly, Mr. Lomax indicated that wetlands are identifiable by the kinds of species which survive under the conditions present within that environment. He

distinguished marsh wetlands from swamps. Marshes are wetlands which are usually inhabited by herbaceous non-woody vegetation, whereas swamps are generally inhabited by woody vegetation. Tide marsh, as its name implies, is marsh that is under the influence of the tides. Generally, tide marsh is synonomous with salt water marsh.

Man has chosen to protect wetlands for several significant reasons. Most importantly, wetlands function as a buffer, protecting the mainland from large waves and from offshore storms. By the nature of their soil composition, wetlands are highly resistant to erosion; the soil is knitted together by the various plant and fiber life that thrives within it.

Wetlands are central to and a significant part of the estuarine and marine ecosystems—that part of the environment where fresh and salt water mix—rivers, bays, and sounds. The basis and background of the issuance of the New Jersey Wetlands Order (J-2) speaks of the estuarine zone as the area between the sea and the land and describes it as "unique".

> It is related to the sea and the land, but it is different from either. The "estuarine zone" is composed of bays, harbors, lagoons, channels, inlets, barrier beaches, sounds, estuaries.
>
> WETLANDS (tidal marsh), submerged lands (riparian), tidal portions of many fresh water streams and tributaries, and coastal and intertidal areas. Complex physical, chemical, and biological forces act and interact within this zone and create an exceptional but delicately balanced environment. [J-2 at 2.1]

The waters around wetlands and the estuarine are also valuable for fin and shellfish production; marshes trap sediments and pollutants from upland environments and bind them within the wetlands, allowing them to become a natural filter. From a biological perspective,

wetlands serve as a valuable natural wildlife habitat. Wetlands also serve as nursing grounds where fin fish produce their offspring.

In addition, and quite significantly, within the wetland environment detritus is produced, which is an organic soup, microscopic in size, and used for food and energy by many species. The basis and background of the Wetlands Order also addresses the significance and nature of detritus:

> Plant life occurs in all WETLANDS as marsh grasses and algae. These plants grow and die. Decay transforms their tissues into minute fragments of food and vitamin-rich detritus. This detritus is suspended in the water and forms a nutritious "soup" that is carried into tidal creeks, bays, and offshore waters. Nearly all species of sport and commercial fish, shellfish, and other marine creatures in the estuarine zone are dependent on this "soup" for food, directly or indirectly.
>
> Marsh detritus is transported back and forth by tidal action into sounds and bays and, eventually, to nearshore waters. This "outwelling" of nutrients and materials into the sea is similar in mechanism and magnitude to oceanic upwellings that support valuable fisheries in various parts of the world. Outwelling provides nutritional materials that may support marine life at long distances from our coast. Thus, there is a continuum from the WETLANDS to the open seas. Some fish that never enter or utilize WETLANDS are dependent on the estuarine zone for the contiuous enrichment of their oceanic habitat. [J-2 at 2.3 and 2.4]

Wetlands also function as a natural filter for water, removing phosphorus and nitrogen pollutants from it.

It is clear that two factors are prominent in evaluating and protecting the wetlands. First, wetlands require that a delicate, subtle, equilibrium be maintained in order to retain the properties which make them so valuable. This balance is reflected as well in the basis and background of the Wetlands Order:

> The WETLANDS constitute an ecosystem. Each plant species or species association is not individualistic or self-sustaining; species interact and are interdependent. This holds true also for the animal life (snails, amphipods, worms, and insects) of the marshes which depend on the plant life. The larger and more evident animals at the top of the intricate food chain are dependent upon the productivity of the WETLANDS for their survival. Man can easily destroy the delicate balance of the WETLANDS, triggering changes which infringe upon and decimate waterfowl populations. [J-2 at 4.1]

Secondly, it is crucial to recognize and understand wetlands within the context of the entire ecosystem; as a consequence of the manufacture of detritus, a food chain is initiated, fed on by various bacteria and microscopic fish life which in turn becomes the food for larger invertebrates. These later become sources of nourishment for fish, waterfowl, and crustaceans and central to the entire chain of life.

As an incident to the fundamental characteristics of wetlands, and in respect to maintaining their balance in the ecosystem, Mr. Lomax noted that tidal circulation is significant. Through tidal circulation (which may sometimes become flooding) detritus is carried away from the wetlands, initiating the food chain. Elevation of the wetlands area must also not be impaired since there is a direct correlation between the sea level of the wetland area and the extent of tidal inundation. The greater the rate of tidal circulation and the more significant the flooding both in frequency and in duration, the greater the fecundity of wetland production of detritus and vegetation. In measuring the extent of tidal circulation and flooding, scientists observe the nature and growth of various species of vegetation endemic to wetlands. From these they may infer the extent of flooding and circulation.

Another concern in respect to the protection of the wetlands environment is that movement of wrack with the tides be free and unencumbered. Unlike detritus, which is organic and microscopic food matter, wrack was described as wreath-like organic matter not finely broken down and clearly visible to the eye. The danger of allowing wrack to accumulate on wetlands rather than to flow freely through them with the tides is that if wrack accumulates and rests on the wetlands, vegetation growing beneath it will not properly thrive, thus offsetting the vegetative balance. Mr. Lomax also noted that the accumulation of wrack might prevent the exportation of detritus by the free-flowing tides through the creation of a berm—a natural dike. The berm would thus impede the free flow of tides, blocking the transportation of detritus.

The Site

It was stipulated that the site on which the billboard construction is proposed is property designated as wetlands by the Department. The tract of land on which the petitioner proposes to construct new billboards and to add on to existing billboards is located immediately adjacent to and on the southwest side of New Jersey State Highway, Route 72, in Stafford Township, Ocean County, New Jersey. (See P-2, a photograph of the site, and P-3, a plotting of the site prepared by engineers.) The tract is a narrow sliver of land with an area of 20.793 plus or minus acres, boardered on the northwest by Route 72 and surrounded by developed urban areas, which is separated from the site by a roadway. At its southeastern tip, where the tract narrows, and only a few feet from proposed billboard #5, is Fox Island Creek, approximately 30 to 40 feet wide and the only natural waterway nearby or adjoining the site.

Route 72, the natural northwestern boarder of the site against which it abuts, is a major artery leading from the mainland to Long Beach Island, a popular tourist attraction. The highway is the only overland route to and from Long Beach Island. Both the Garden State Parkway and Route 9 are the major arteries connecting to Route 72 and each intersects the roadway west of the project site. Thus, the proposed billboards would be placed at a highly visible location which would attract the densest traffic coming to the island from Route 72; this is to be compared with other sites west of the intersection of the Garden State Parkway and Route 9. The site is a prime real estate location from the perspective of its commercial application to outdoor advertising.

The Site as Wetlands

In January 1984, and at the request of Mr. Bell, Joseph Lomax visited and spent approximately six hours at the site, where he made various observations in order to assess its condition as well as the impact of the existing and proposed construction on the wetlands. Before addressing in detail the various observations made by him or the conclusions he derived, it is appropriate to summarize Mr. Lomax's background and qualifications.

Mr. Lomax received a bachelor of science degree in agriculture and earth science from Rutgers University. In 1970 he was awarded a master of science degree in entomology with a minor in vertebrate zoology from the same institution. He continued his studies in entomology and ecology in the doctorate program at Rutgers from 1970 through 1973, but did not prepare a final dissertation.

Since 1963 he has undertaken extensive research in wetlands. From 1973 through 1975, he participated in the mosquito control unit in Cape May County where he served as its entomological science advisor. As incident to his responsibilities, he studied wetlands within the county to assess the safest and most economic means of protecting the wetlands and the most effective means to use and control the mosquito. In this position he worked on areas which were mapped as wetlands.

In 1976 Mr. Lomax established his own environmental consulting firm serving both the public and private sectors. It undertakes preservation planning, conducts feasibility studies, prepared environmental impact statements, undertakes natural resource inventories, and addresses issues concerning endangered species. His firm currently specializes in wetlands activity, endangered species research, and ecological issues. He has assisted his clients in obtaining approval before numerous local, county, state and federal administrative entities, including the Department, the Pinelands Commission, and the United States Army Corps of Engineers. Mr. Lomax estimates that his firm has been instrumental in 200 wetland projects.

Since 1976 Mr. Lomax has been a distinguished adjunct lecturer at Stockton State College, where he teaches courses in ecology, natural history, photography, and wetland ecology and issues. He is a trustee of the Wetlands Institute and is a member of the American Association for the Advancement of Science and the Society of Wetland Scientists. He has published several articles which deal directly with mosquito control and related wetland problems. Mr. Lomax's distinguished background clearly manifested itself in the high quality and articulateness of his testimony as an expert on behalf of the petitioner.

Mr. Lomax initially addressed the general parameters of the site and described its characteristics. He indicated that the site can generally be described as boxed-in tidal marsh, characterized as coastal wetlands. It is composed of organic, unconsolidated soils and saturated soils with typically wetland vegetation. As a consequence of its abutment to Route 72, a high berm north of the tract was created; dust and dirt are blown off the road onto the tract; there is some storm water runoff, and as a consequence of human footprints apparently from the highway, some vegetation is disturbed and some erosion has occurred. The vegetative composition of the site is comprised primarily of Spartina alterniflora, salt marsh cord grass, and salt marsh cord grass with low vigor. Also present on the tract is a mosquito ditch, a man-made ditch created so as to allow for the entrance and egress of fish to the wetlands area and designed to biologically eliminate the mosquito.

In respect to the extent of tidal circulation on the tract, Mr. Lomax indicated that it was insignificant. Based upon his studies of the published charts of intercoastal highways, the natural tidal range at Fox Island Creek is only one and one-half feet. Also, there are only two breaks in the berm which was created to abut Route 72 through which the water can flow onto the site. Other than the tidal circulation caused by the man-made mosquito ditch, these two breaks in the berm serve as the only source within which the tides may circulate and "outwelling"—the flushing outward of the water to the oceans and the bays in which organic detritus may be transported—may occur.

In respect to the vegetation, and particularly to how that vegetation provides circumstantial indications of the extent of tidal circulation, Mr. Lomax indicated that

while salt marsh cord grass has the ability to grow in tidally inundated as well as noninundated areas, the extent of its growth is determinative of the tides. Short salt marsh cord grass grows to approximately eight to twelve inches and indicates limited tidal inundation; higher salt marsh cord grass grows to approximately three to four feet during the blooming and fruiting season and is evidence of a significantly greater tidal inundation. In addition to the presence of salt marsh cord grass, the presence at the site of spike grass and high tide bush suggests an area which receives inundation, but not on a daily basis, thus indicating that detritus leaves the system at a restricted rate.

The site, by its configuration and by the adjoining properties, is boxed in, thus constricting and limiting the outflowing and transportation of detritus. Mr. Lomax also indicated that most northeasterly storms assist in transporting detritus within wetlands back into the ecosystem; in respect to the site, however, if a storm occurs over a sufficient duration, some water would be pumped back into the system because of the presence of high berms, and the opportunity for the wind and storm waves to break up and export detritus into the ecosystem is sharply reduced.

The conclusion that I have arrived at concerning the general wetlands characteristics of the site based upon the testimony of Mr. Lomax is that it appears to be average to below-average wetland; that is, it is neither unique nor overly productive, but at the same time it does not lie fallow. It is typical wetland.

The Structures and their Locations

After making the various general observations of the site, Mr. Lomax addressed himself to the specific locations on the site where billboard construction has already taken place and to the specific locations where additional construction is proposed. He testified in respect to his observations of those locations, and the consequences, if any, on the wetlands from the construction already undertaken and that which is proposed.

For purposes of clarity, reference is made to P-3 in evidence and each billboard will be referred to by number. (Mr. Lomax photographed the site and many of his photographs were offered into evidence: P-4a through P-4f are photographs of site 1; P-4i through P-4k are photographs of site 2; P-4l though P-4n are of site 3; P-4o through P-4s are of site 4; and P-4t through P-4x are of site 5.)

Billboard 1 is located at the extreme northwestern edge of the site. Billboard 1 is a 10 x 48-foot structure constructed in 1966 (prior to the adoption of the Wetlands Act) with 28 pilings set in place. Although an additional 24 x 10-foot face is "proposed" at the site, the facing has *in fact* already been constructed by petitioner, without first having followed the appropriate permit procedures. An additional five pilings have also been set to support the second face.

The vegetation surrounding billboard 1 is salt meadow cord grass and low vigor Spartina alterniflora. In Mr. Lomax's view, the vegetation indicates that the site (at least the "footprint"—the area immediately surrounding the billboard) does not receive frequent tidal inundation. He described the land immediately below the

billboard as receiving only a "minor disturbance" from the installation and implacement of the pilings. There was, he acknowledged, some sediment on the surface of the land and while grass was growing, it had not completely grown back. He also indicated that the growth and vigor of the natural species surrounding the original pilings were "normal."

Mr. Lomax described the wildlife surrounding billboard 1. In his judgment, the salt meadow cord grass was utilized as a food source by gulls and the structure of the billboard itself served as a roosting area. The only wrack line Mr. Lomax found at the billboard was a small amount at its extreme edge. In his judgment, this signifies that in spite of the 28 pilings set for billboard 1, wrack is still transported unobstructed through the structure. My own observations of the photographs of the site concur with Mr. Lomax's; however, P-4d, particularly, and P-4c to a lesser extent indicate that sediment settling on the surface grass has disturbed the typography in such a manner that the term "minor" used to describe the disturbance might be arguable.

Billboard 2 is the second most northwesterly site on the tract of land. At this location, petitioner requests to construct a new double-faced billboard, 48 x 10 feet on one side and 24-10 feet on the other. As the photographs indicate, while the billboard is not yet in place, 33 pilings have already been set, although without petitioner's having first obtained the requisite permit. The photographs also indicate that there has been obvious disturbance as a result of the installation of these pilings, which were set in place by "jetting," a process to be discussed later in this decision. Mr. Lomax estimated that approximately 35 percent of the area at site 2 has received some disturbance as a consequence of jetting; sand and silts which were uprooted disturbed the vegetation. No debris, however, was found.

Mr. Lomax described the vegetation at the site as salt marsh cord grass, and low vigor alterniflora, indicating again that the tidal inundation is not a daily occurrence. The only wrack he discovered at the location was immediately adjacent to Route 72. He concluded that the 33 pilings that have already been set do not interfere in any way with tidal circulation, that circulation would never even extend to the pilings, and that the vegetation which was disturbed at the footprint of the pilings has already returned.

The billboard located at site 3 is at approximately the center of the entire tract of land and as the photographs indicate, no construction has yet to take place and no pilings have been set; the specifications of the proposed construction is the same as described at site 2. An examination of the photographs, however, does indicate that a number of pilings have already been placed *on* the land, although not set in the land, in apparent preparation for their implacement.

Mr. Lomax described the vegetation at site 3 as a combination of moderate to low vigor Spartina alterniflora. It is noted as well that proposed site 3 is adjacent to the mosquito ditch where Mr. Lomax did observe signs of wildlife—fiddler crab holes, salt marsh, kelly fish, and a sheep's head minnow. He indicated that these fish survive well in high marsh ponds and mosquito ditches. In his judgment proposed billboard 3 would not interfere with the fish as long as the pilings were not placed directly in the fish channel.

A pre-Wetlands Act billboard, constructed in 1966, is already located at site 4 and a partially constructed second 24 x 10-foot face with additional pilings is also in place for which a *post hoc* permit is requested. The vegetation observed at the site was dominated by salt

meadow cord grass. Mr. Lomax observed some erosion as a result of the contiguity of a Route 72 right-of-way. He described the vigor of the cord grass as fairly common, concluding that tidal circulation in the general vicinity appeared to be good. He discerned no debris or wrack line within the footprint of the structure, except where higher elevation plants were found; he acknowledged discovering some debris in that area. Mr. Lomax concluded that flooding at the site occurs only when there is storm tide.

Based upon his observations of the site and his understanding that the original billboard has existed since 1966, Mr. Lomax concluded that the footprint surrounding the site has virtually revegetated itself; there was little debris and no wrack. In respect to the area on which additional pilings had been set, he described the disturbance surrounding it as "limited," referring to some vegetation which presumably was covered with sand and sediment. Mr. Lomax also observed some wildlife in the vicinity, particularly salt marsh snails. He also noted that the billboard itself would normally be used by birds of prey as a roosting place.

Site 5 retains a pre-Wetlands Act billboard which has been in existence since 1966 and for which, without authority, additional pilings have already been set to support the second 24 x 10 foot face. Mr. Lomax indicated that he observed significant erosion at site 5, as a consequence of sand being washed down from the bank of Route 72, causing harm to the vegetation. At the site he observed two different species of vegetation. Adjacent to the highway he observed Spartina patens (salt meadow grass) and at a distance away from Route 72 he observed Spartina alterniflora and salt hay. He

described the vigor of the Spartina patens as "common growth form" and spindly where sediment had washed down from the embankment of Route 72, and he described the Spartina alterniflora as low vigor. As a consequence of his observations of the vegetation, Mr. Lomax concluded that tidal circulation may inundate on a regular basis at one end of the billboard addition. In respect to the remaining portion of the proposed billboard he concluded that tidal inundation would not occur on a daily basis. In respect to the billboard already in existence, he also concluded that there was no debris which would accumulate at the footprint that would in any way alter the tidal circulation.

Except for the billboard at site 5, Mr. Lomax concluded that none of the other sites is immediately adjacent to any waterway, except for the presence of the mosquito commission ditch. In respect to site 5, located at the southeastern tip of the tract, it is immediately adjacent to Fox Island Creek.

Mr. Lomax also testified as to matters which did not call upon him to exercise his scientific expertise, which were based upon his own intelligent observations of the tract, the structures at issue, and the relationship between those structures and the wetlands. Initially he described the various billboards. Generally, each of them is between one and one-half feet thick and is at least fourteen feet above the grade level of the land. Each has a platform abutting at its front, which serves as a walkway on which workers can presumably repair the structure and make changes to its facing. These walkways are less than five feet wide. The billboards proposed at sites 2 and 3 will be 48 feet across. Each will require the installation of approximately 30 pilings which

are approximately 1 foot in diameter. They will be placed approximately 7 to 10 feet apart and thus encompass a total area of approximately 1,400 square feet.

In respect to the existing billboards at sites 1, 4 and 5, the proposal calls for 10 foot additions; for each, 5 pilings are required. Thus, a total of 75 additional pilings will have to be set in place, each of which is approximately 1 foot in diameter (15 pilings for the 3 additional billboard faces and 30 pilings for each of the 2 new proposed billboards). Mr. Lomax determined that for each piling set in place .78 square feet of soil is displaced, and as a consequence he indicated that only a total area of 58.5 square feet of the entire tract of 20.793 plus or minus acres will be displaced because of the additional pilings. From a percentage point of view, only .00645 percent of the entire tract area will be effected by the installation of the pilings and would thus be "taken out of production" as wetlands. It should also be noted that in respect to the entire billboard construction at issue, only the pilings actually touch the wetlands.

The Pilings

As was indicated previously, installation of pilings can be effected by utilizing one of two processes: jetting or driving. Pilings are jetted when, through the use of various equipment, a pipe is inserted into the ground and water at high pressure is forced through the pipe, sending the underground fluids and sediments to the surface. The pilings are then inserted into the orifice created as a consequence of the expulsion of the fluids and sediments.

Pilings are driven in place by placing a collar over them, positioning them above the surface of the ground, and exerting sufficient force to literally pound them into

the land. Exhibit P-4q is a photograph of pilings which were driven into site 2 on the tract. The only visible impact of the driven piling is that there is a loss of grass within the cross section of the implantation; the wetlands vegetation immediately surrounding the piling shows no immediate disturbance.

Mr. Lomax testified that he has observed the driving of pilings in other areas and discerned no evidence of sedimentation surfacing above or below where the piling is driven. The only other possible impact of driving of pilings other than those described above is where the grass itself is bent over as a consequence of workers walking; this quickly recovers.

Exhibit P-4d is a photograph taken at site 1 and is an example of a jetted piling. It is apparent from the photograph that as a consequence of the process, sediments welled up from the hole and flowed over the surface of the marsh, creating a thin veneer. The effects on these covered areas depend upon the composition of the sediment—the heavier it is the more it will build up over the surface covering the area around it. Indeed, in P-4d the sediment did cover an area measured by approximately five feet around the piling.

Mr. Lomax attested, and it is apparently the prevailing view, that the driving method is preferable to the jetting. He noted, however, that even when the jetting method is employed, sediment disturbance is only temporary and the marsh surface is not significantly changed; within two growing seasons (one to one and one-half years) vegetation returns. He indicated that this can even be improved if the sediment were physically removed from the marsh or if plugs of vegetation from an adjoining marsh area were replanted in the area and the marsh were re-covered.

It is apparent that while jetting might be a more efficient process for setting piles, it results in greater sediment deposition than does driving.

The process selected by the petitioner to place his piles is jetting.

Contour, Elevation, and Light

As was indicated previously, maintaining the natural contour of wetlands is significant in respect to the impact of tidal circulation on the ecosystem. Changing their contour or their elevation effects tidal inundation and the nature and species of vegetation and animal life inhabiting the environment. As a consequence, Mr. Lomax made various site observations and also subcontracted for a survey of the tract in question so as to determine the impact, if any, of the installation of the pilings on contour.

In Mr. Lomax's judgment, there was no significant impact on the contour of the wetlands from the pilings. Wetlands have natural contour variations and alterations in elevation which are indicated by the various species and vegetation upon it. When pilings are jetted, the sediments which are expelled from beneath the surface are organic in nature and are carried off into the marsh. Where sedimentation is inorganic, like sand and gravel, a thin veneer is usually spread over the entire contour and is inperceptible in terms of changing the elevation of the wetlands.

The survey was conducted at site 1, where the billboard has been in place since the mid-1960's, and at site 2, where the 33 pilings were recently set in place through the jetting process. Mr. Lomax testified that for the contour to be altered sufficiently to effect species

composition a minimum of a one-half foot alteration would be required. For the survey, Mr. Lomax obtained the services of an engineering and land surveying company located in the vicinity of the site, which on February 27, 1984, submitted its report (P-5). It indicated that at site 1, where the original billboard had been in place for approximately 20 years, the difference in elevation between the wetlands at the footprint of the billboard and the surrounding area was approximately one inch. In respect to the pilings which have been jetted at site 2, the survey also indicates that the difference between the elevation at the pilings and in the surrounding undisturbed area was between one and two inches. In Mr. Lomax's judgment therefore, the difference in contour of the wetlands based upon the installation of billboard pilings was so insignificant that no appreciable change in the functioning of the wetlands or on the tidal circulation within the marsh would occur.

Mr. Lomax also addressed the possible effects of variations of sun and shade on the wetlands as a consequence of the billboard placements. While he acknowledged that these changes might be a consideration, based upon his observations of the billboards already constructed, it was his opinion that there was no marked difference between the growth of vegetation under and around the billboards and the vegetation and growth at undisturbed areas on the wetlands. Based upon the species of vegetation, their growth form, and their apparent vigor, Mr. Lomax concluded that growth patterns of plants remained unchanged and uneffected by variations of sun and shade. He also indicated that other species which were not observed during his on-site visit but which would commonly be found on wetlands such as those found at the site would not be negatively affected by the sun and

shade differentiation; indeed, the creation of shade by the billboards' interference with sunlight might have some positive effects upon the environment.

Water Dependency

Mr. Lomax compared the potential impact of the proposed construction at issue upon the wetlands with the construction of a marina. This aspect of his testimony was directed at the general regulatory requirement of the Department that for a permit to be issued on wetlands the proposed development must, under certain circumstances, be water dependent or require water access as its central purpose. In Mr. Lomax's judgment, the construction of such a hypothetical marina, presumably a permissible use under *N.J.A.C.* 7:7E-326, would involve "much greater devastation" to the wetlands than would the proposed billboards. He painted a scenario in which, as a consequence of the construction of parking facilities, decking, pilings, and piers, the impact on the wetlands would be significant.

Mr. Lomax then addressed himself to the viability of utilizing the wetlands at issue for an aquaculture purpose. He indicated that the surrounding waters located in Fox Island Creek have been condemned as a shell fish harbor and that aquaculture is unavailable as an alternate use of the site wetlands. Further, in respect to utilizing the wetlands for agriculture, in his judgment, only salt hay farming was a feasible process. In respect to the site at issue, spartina patens could be farmed but to do so would require a substantial renovation of the site, including the installation of a complete berm, implacement of tide gates around the berm to firm up the marsh so as to accommodate farm machinery, the

preclusion of tidal inundation, the construction of a ramp, and various other significant structural undertakings. He concluded by indicating that the tract is a "very difficult spot to harvest grain hay."

In respect to utilizing the site for hunting, because of the narrowness of the stretch and its proximity to urban dwellings, such use would apparently be proscribed by state regulation (see, R-6, at page 9).

In respect to the issue of the permissible use of wetlands where such use is water oriented or water dependent, Department policy is that such requirement only applies to proposed developments which are on or adjacent to waterways. When projects are not adjacent to waterways, water access, orientation or dependency of the proposed construction need not be established. Clearly billboard construction is neither water oriented nor water dependent. In an effort to demonstrate that the site is not adjacent to a waterway, Mr. Lomax expressed his judgment that the only waterway in the immediate vicinity of the property is Fox Island Creek, which abuts the tract only at its most easterly tip. He measured the various proposed construction sites and determined that the distance from the creek to site 1 is 2,530 feet, to site 2 is 1,500 feet, to site 3 is 1,000 feet, and to site 4 is 3,500 feet. He acknowledged that site 5 adjoins Fox Island Creek. Further, he testified that the only other "waterway" adjacent to site 1 is the mosquito ditch which is non-navigable because of its dimensions, artifically created, and not properly considered a waterway as that term is commonly defined.

Petitioner's Conclusions

As a consequence of his extensive testimony and observations, Mr. Lomax derived various conclusions in respect to the proposed and completed construction. They may be summarized as follows:

> 1. The project will result in minimal, feasible impact to the natural tidal circulation at the site. The site is not flooded on a regular daily interval which can be determined by the observation of the natural vegetation in the area—primarily low vigor spartina alternaflora, spartina patens, and marsh elder. The latter is found only at the footprint of the site, which indicates non-daily flooding.
>
> 2. Based upon observation as well as on-site surveys, the project will result in minimal impairment to the contour or elevation of the site. Within the footprint of the site, the natural vegetations are comparable to those which grow adjacent to and around areas which are undisturbed.
>
> 3. The project will result in minimal alteration to the natural species of vegetation. This conclusion is based upon the assumption that any future pilings will be placed by the jetting process. If the remaining pilings are driven, on a short-term basis there will be minimum impairment (even less than through jetting); on a long-term basis the difference between the processes will be minimal. If jetting is the process utilized for the installation of the additional pilings, it is Mr. Lomax's conclusion that the most effective way of eliminating any possible alteration to the natural vegetation of the wetlands would be to remove any excessive sedimentation and replant the vegetation with plugs of appropriate vegetation.

Cross-examination of Mr. Lomax did not significantly diminish the validity of his observations and fact-finding or the reasonableness or reliability of

most of the conclusions which he expressed. It did establish that much of his opinion was not based upon empirical study so much as on first-hand observation. For example, he acknowledged that in order to ascertain the productivity of the site as compared with other wetlands, which in his judgment (and mine, based upon my review of his testimony) indicates that the site is average to less-than-average in productivity, a comparable study should be undertaken. Similarly, no studies were undertaken in respect to the transportation of detritus from the site into the estuarine. He acknowledged as well that although the mosquito ditch primarily functions to provide access to various species of fish to consume the mosquito larvae, it also permits the drainage of surface waters from the site, increases the marsh's ability to export detritus, and helps to irrigate the land.

Mr. Lomax also acknowledged that as a consequence of the jetting of pilings at site 2 there was indeed disturbance of vegetation. His knowledge of and conclusions about the impact of the northeast storms over the area were also, by his own admission, not based upon any actual tidal measurements but upon his observations coupled with his general scientific awareness. He also acknowledged that any conclusions that he expressed concerning the potential spoilation of the wetlands through billboard maintenance were derived exclusively from what Mr. Bell told him.

The Department's Position

Mr. Phillip Sandine is the supervisor of the north shore region of the Bureau of Coastal Project Review and has an extensive and distinguished scientific background. Mr. Sandine's testimony did not

significantly add to that which was offered by Mr. Lomax in respect to the nature of coastal wetlands, the site at issue, or the potential impact on that site of the proposed construction.

Mr. Sadine visited the site on one occasion, for only 30 minutes. This occurred to the best of his recollection in March 1983. His testimony thus was not based upon any first-hand visual observations or on any studies which he conducted; rather his comments related in general terms to the various wetland maps which were offered into evidence by the Department to place the site in the proper context of the general geographic area of its location. In my judgment those perspectives in that context were consistent with the general propositions set forth by Mr. Lomax as well as his specific observations of the tract in question.

One must conclude that the Department did not have any significant scientific facts or any opinions based upon those facts which would rebut the testimony offered by Mr. Lomax, particularly in respect to the potential alteration or impairment of the tract's tidal circulation, contour, elevation, wildlife, or natural vegetation as a consequence of the existing or proposed billboard construction. The Department's factual opposition to the proposed construction rests significantly upon the lay observation and testimony of Mr. Robert Piel, who is the principal planner of coastal zone management and has been with the Department since 1979. Even though the Department did not seek to qualify Mr. Piel as an expert witness, he does possess a scientific background. He received a bachelor of art's degree in life sciences from Glassboro State College and a master's degree from the same institution in conservation and environmental education. Mr. Piel was

responsible for making the ultimate recommendation to the Director that the permit be denied. In addition, he visited the site on March 3, 1983, but his testimony did not provide any additional data other than that he observed some sediment at sites 2 and 4 and some matted vegetation at site 5.

Adjacency to a Waterway and Availability of an Alternative Site

Mr. Piel addressed himself to two of the criteria that must be satisfied for the issuance of the permit. He first testified that based upon his observations, the entire tract of land upon which the construction is proposed is adjacent to a waterway—Fox Island Creek. Thus, and pursuant to Department policy, in order for the proposed development to be permissible, it must require water access or be water oriented as its central purpose. Mr. Piel reached the conclusion that the project site was adjacent to a waterway by merely examining a map of the location and applying Department policy, which is that the entire tract of land is considered as an *entity* in determining adjacency and that each specific area on the tract at which a billboard site is proposed is not separately considered in resolving the issue of whether the wetlands are or are not adjacent to a waterway.

Mr. Piel also addressed himself to the issue of whether a prudent or feasible alternative on an non-wetlands site would be available on which the billboards could be constructed. He indicated that in his judgment prudent non-wetland alternatives were available at other sites in the area. He indicated that he toured the general location by automobile, driving on New Jersey State Highway 72, as well as New Jersey State Highway 9, where he observed numerous other billboards erected,

and that in his judgment the only limitation upon alternative areas of construction is other property which has been mapped as wetlands along and adjacent to Route 72.

As a consequence of his and the Department's view that two of the criteria for permit issuance were not complied with—a prudent and feasible alternative on a non-wetland site for the construction of the billboards is available, and the project does not require water access and is not water oriented (being adjacent to a waterway)—he acknowledged that the Department undertook no detailed wetland study. It is his and the Department's position that such study was unnecessary in order to determine whether the remaining criteria under the permit regulations were complied with in that *each* of them must be complied with for permits to issue. The Department concludes that by necessity if the above two criteria are not satisfied the other criteria have also not been satisfied. Any alteration or impairment to tidal circulation, contour or vegetation would, by necessity, be more than minimally feasible.

Mr. Piel concluded that the Department's position is that if a construction project *is* permitted, driven pilings are preferable to jetted. In this matter, the petitioner applied to jet the pilings and not to drive them. Mr. Piel further opined, however, that even had Mr. Bell agreed to drive the pilings, the Department would have still denied his permit application, since at least two of the criteria under the regulation have been left unsatisfied.

During cross-examination, Mr. Piel acknowledged that ultimately all wetlands are adjacent to some body of water, and that to the best of his knowledge no specific regulation defines "adjacency." He also acknowledged that in touring the area seeking prudent alternative sites

for billboard construction, he did not make a detailed review of available locations, nor did he identify any specific area.

Petitioner's Position Concerning Alternative Sites

Mr. Bell testified concerning the background of his construction business, as well as the particular proposals at issue. He thereafter addressed himself to the question of whether there were alternative sites on which his billboards could be placed.

Wesley Bell has been in the outdoor advertising business since 1957, trading as Wes Outdoor Advertising. The business is his sole source of income. He currently has approximately 60 billboards in operation, located in southern Ocean County; in respect to the billboards at issue, he is the contract purchaser of the land that is owned by a third party.

Mr. Bell noted that that area along Route 72, which is between the Garden State Parkway, Route 9, and Long Beach Island, is the most heavily trafficked, most profitable, and most in demand for purposes of outdoor advertising. The advertisements that are generally placed on the billboards are for retail establishments on Long Beach Island which cater to vacationers, i.e., restaurants, food markets, sporting goods and liquor stores.

Mr. Bell offered into evidence a map which he personally prepared of the streets and roadways in the general vicinity at which the site is located. The map was colored in by Mr. Bell in an effort to demonstrate the unavailability of appropriate and alternative tracts along Route 72 in the general site vicinity upon which he could construct his billboards (P-10).

Accepting the accuracy of Mr. Bell's map, a significant portion of the area has been condemned by the Department of Transportation since 1959 (marked in yellow). Indeed, Mr. Bell has been in litigation in respect to this property because he presumably has other billboards constructed upon it. Other broad areas along Route 72 have been heavily filled in by new or existing business construction. It was Mr. Bell's assertion that these establishments are averse to leasing their space to allow for the construction of billboards and, in his judgment, they are unavailable for this purpose. He did acknowledge, however, that he had no direct personal knowledge of this conclusion but rather he is basing it on inferences which he has drawn as a result of past experiences. Alternatively, he indicated that where some property owners have manifested a willingness to lease, asking prices are excessive. Further, Mr. Bell suggested, where retail establishments are not present and where property has not been condemned, residential zoning proscribes the construction of billboards; this is particularly so due west of the project site. By letter of May 24, 1984 and accompanying document, Mr. Hluchan has indicated that a recently enacted Stafford Township ordinance (number 84-35) prospectively prohibits any further billboard construction within that municipality. While by his own acknowledgment the ordinance has no effect on the billboard proposals at issue in this proceeding, counsel offers this ordinance (which pursuant to *N.J. Ev. R.* 9 is judicially noticeable) to support his argument that no alternative sites are available to Mr. Bell. In her responsive letter of May 30, 1984, the deputy attorney general initially takes issue with the procedure Mr. Hluchan has employed in respect to bringing this matter to my attention; in addition she argued that even if the ordinance were considered, it is

the Department's view that the availability of alternative and feasible sites for billboard construction in the *immediate* vicinity of the proposed site is not relevant to whether Mr. Bell has satisfied the regulatory criterion.

Mr. Bell acknowledged that although there are no available alternative sites upon which he could construct his billboards on Route 72 east of where it is intersected by the Garden State Parkway, other areas in the general vicinity of Long Beach Island might be available to him for the construction of billboards, such as Route 9; the implication, however, was clear that the issue was one of profit as much as it was of the actual availability of land. The prime location for billboards is where the project site is currently located. The petitioner also stated that he is capable of constructing billboards anywhere in New Jersey, but he has chosen to limit himself essentially to the shore market.

ANALYSIS AND DISCUSSION

Activities which may or may not be engaged in on coastal wetlands are initially governed by *N.J.S.A.* 13:9A-4, which defines a "regulated activity" as including but not limited to draining, dredging, excavation or removal of soil, mud, sand, gravel, aggregate of any kind or depositing or dumping therein liquid wastes, either directly or otherwise, and the erection of structures, drivings or pilings, or placing of obstructions, whether or not changing the tidal ebb and flow. *N.J.S.A.* 13:9A-4(a).

Pursuant to the regulatory scheme set forth as part of the Wetland's Order, *N.J.A.C.* 7:7A-1.1 *et seq.*, the scope and parameters of regulated activity is further defined and a procedure for the issuance of two types of permits, type A and type B, is devised. Type B permits

are issued for proposed activities which are of a significant and extensive nature, i.e., the installation of utilities, the excavation for boats and channels and mooring basins, and the construction of seal walls. *N.J.A.C.* 7:7A-1.2(c). Type A permits are necessary for proposed activities which presumably have a lesser impact on the wetlands and involve a considerably narrower undertaking, i.e., excavating small boat mooring slips; maintaining or repairing bridges, roads, or highways; constructing catwalks, piers, docks, landings, foot bridges, and (pursuant to the agreement of the litigants) the driving of pilings and the construction of billboards. *See, N.J.A.C.* 7A-1.2(b).

There are also activities which by their nature are prohibited and cannot be engaged in by anyone: dumping of waste refuse, industrial waste, and domestic sewerage, and storage or disposal of pesticides. *N.J.A.C.* 7:7A-1.2(d). Moreover, this list is not exclusive in that the definition of a "prohibited activity" found at *N.J.A.C.* 7:7A-1.3 is "any activity or use of wetlands which shall not be permitted."

The criteria which must be met in order for the Department to issue a type A permit are set forth at *N.J.A.C.* 7:7A-1.5(a) as follows:

> (a) The Commissioner shall review the filed application and shall issue a Type A permit only if he finds that the proposed activity:
>
> 1. Is a Type A activity and the application is complete;
>
> 2. Requires water access or is water oriented as a central purpose of the basic function of the activity;
>
> 3. Has no prudent or feasible alternative on a non-wetlands site;

4. Will result in minimum feasible alteration or impairment of natural tidal circulation;

5. Will result in minimum alteration or impairment of the natural contour of the natural vegetation of the wetlands.

As has already been indicated, the burden in this matter rests with the petitioner. He must establish by a preponderance of the relevant and credible evidence that each of the various criteria set forth above has been met. If he fails, the Department is justified in denying the issuance of a type A permit to him.

It is clear, therefore, that a resolution of this matter is dependent upon a determination of whether the petitioner can establish his compliance with each of these criteria. It is also clear that the Department to a very great extent relies upon its determination that criteria 2 and 3 have been unsatisfied; that is, it argues that the billboard construction does not require water access or is not water oriented as its central purpose (since adjacency is purportedly established) and there are prudent and feasible alternate non-wetland sites on which the same activities may be undertaken. As a consequence, much of the case is dependent upon a construction, understanding, and insight into the intent and meaning of these two criteria.

A proper analysis and construction of the regulation must begin by examining the broad context of the express public policy of the State of New Jersey in respect to the protection of wetlands. Obviously, a fundamental objective of statutory and regulatory interpretation is to ascertain legislative intent. One must look at the full context of the legislation on the subject and must consider the object of the legislation and the

problems sought to be remedied in order to properly construe the statute or regulation at issue. *See, In re Suspension of Heller,* 73 *N.J.* 292, 299 (1977). In addition, the legislative history of the Wetlands Act must be considered, including sponsor statements, and committee reports, which may function as proper guides in determining the intent of the enabling legislation as well as the implementing regulations. *State v. Sanchez,* 149 *N.J. Super.* 381 (Law Div. 1977).

The clear overriding public policy of the State as well as the express legislative intent of the Wetlands Act is to vigorously and scrupulously protect these environments. *N.J.S.A.* 13:9A-1, entitled "Legislative Intent," provides as follows:

> The Legislature hereby finds and declares that one of the most vital and productive areas of our natural world is the so-called "estuarine zone," that area between the sea and the land; that this area protects the land from the force of the sea, moderates our weather, provides a home for water fowl and for 2/3 of all our fish and shellfish, and assists in absorbing sewage discharge by the rivers of the land; and that in order to promote the public safety, health and welfare, and to protect public and private property, wildlife, marine fisheries and the natural environment, it is necessary to preserve the ecological balance of this area and prevent its further deterioration and destruction by regulating the dredging, filling, removing or otherwise altering or polluting thereof, all to the extent and in the manner provided herein.

In his statement on the Wetlands Act of November 5, 1970, Governor William T. Cahill also recognizes the great importance of this environment as well as the concomitant obligation of the State to curtail development so as to preserve the wetlands for the

public benefit. He indicated: "New Jersey's riparian lands . . . constitute one of our most valuable and irreplaceable natural resources. . . ."

Experts are convinced that the area where the land meets the water has consequences on all life. In essence, protection of these lands, which are estimated to exceed one-fourth of a million acres, is necessary so as to protect the entire marine ecosystem. *See, Goldshore,* "Trends in Environmental Litigation," *9 Rutgers-Camden Law Review,* 21, 24 (1977).

Further, the statement annexed to the wetlands bill when presented to the New Jersey State Assembly in 1970 indicates:

> This bill is designed to safeguard one of the most vital and productive areas of our natural world, the estuarine zone. Gives commission of conservation and economic development broad powers to control the development of these areas. [Assembly Bill No. 505 Statement, 1970]

The significance of these lands as well as the fundamental policy of protection is summarized as well in the conclusions of the New Jersey Wetlands Order (J-2) where it is indicated:

> WETLANDS are ecosystems and are integral to larger estuarine zone ecosystems. WETLANDS support plan species and species communities which are in dynamic but delicate balance. The biophysical environment determines that balance. This complex environment is subject to and is shapped by those natural, physical, chemical, and geological principles governing the tides, ocean currents, coastline slope, climate, river flows, and sedimentation patterns. *The object of the proposed order is to control man's impact on this complex environment and on the WETLANDS themselves so that these vital lands can continue to serve man and nature.* [emphasis added]

It is clear based upon the foregoing review that the public policy of the State of New Jersey is unequivocal and aggressive: wetlands must be scrupulously protected; their importance within the estuarine and the delicate environmental balance which they have achieved confers upon the State an enormous responsibility for their maintenance. In the end, protection of the wetlands is protection of man.

It is also clear that science has not yet amassed a detailed knowledge of wetlands protection; much remains to be discovered. Between now and when additional scientific information becomes available, the obvious course to follow is one of prudence and caution: to err on the side of relaxing the standards of wetland protection could result in a reduction of the margin of safety and create the potential for irrevocable harm. It is also clear that the Department of Environmental Protection is reposed with the significant responsibility for the protection of wetlands and that in promulgating its various regulations governing their permissible use, it must act in full compliance with prevailing public policy as well as the legislative mandate of the enabling statute.

It is within this context that the regulation at issue as well as the arguments of the petitioner in respect to his purported compliance with the criteria set forth must be evaluated.

I am convinced from the testimony of Mr. Lomax that criteria 4 and 5 under the regulation have been met: the billboards which have already been constructed and those which are proposed, as well as the pilings which are necessary to support each, will not result and have not resulted in any appreciable alteration or impairment to the natural tidal circulation, the natural contour, or

the natural vegetation of the wetlands. It will be recalled that the testimony of Mr. Lomax in respect to these observations went substantially unrebutted at the hearing. I accept Mr. Lomax's expertise as well as the veracity of his assertions and thus, although there was some minimal change to the contour of the land, and to the vegetation, particularly under the footprint of several of the billboards, but no appreciable alteration to the tidal circulation or to the accumulation of wrack, the impact upon the wetlands under criteria 4 and 5 was so *de minimus* as to warrant a conclusion that these requirements have been satisfied.

In respect to criteria 2, it is provided at *N.J.A.C.* 7:7A-1.5(a) 2 that the proposed development is permissible providing that it requires water access or is water oriented as a central purpose of the basic function of the activity. Water orientation or water access is equated by the Department with "water dependency" as that term is defined at *N.J.A.C.* 7:7E-1.6(c), which provides as follows:

> "Water dependent" means development that must have direct access to the body of water along which it is proposed in order to function Maritime activity, commercial fishing, public waterfront recreation and marinas are examples of water-dependent uses, but only the portion of a development requiring direct access to the water is water dependent. The test for water dependency shall assess both the need of the proposed use for access to the water and the capacity of the proposed water body to satisfy the requirements and absorb the impacts of the proposed use. A proposed use will not be considered water dependent if either the use can function away from the water or if the water body proposed is unsuitable for the use. For example, in a maritime operation a dock or quay and associated unloading

> area would be water dependent, but an associated warehouse would not be water dependent. Housing, hotels, motels, casinos and restaurants are not water dependent.

It is undisputed that as a matter of Department policy, the requirement of water access, water orientation, or water dependency applies only to a proposed development which is on or adjacent to a waterway. While no relevant definition to a "waterway" has been found in the context of the regulations at issue, it is clear that the mosquito ditch on the site does not meet the description. In construing statutes or regulations, words must be given their ordinary and popular meaning unless it is evident that they are employed in a technical sense. *State v. Joas*, 34 *N.J.* 179, 187 (1961). The mosquito ditch is man-made, unnatural, and is not within the scope of the prerequisite criteria for permit issuance.

In respect to Fox Island Creek, the testimony indicated that this creek abutted the southeastern tip of the property immediately adjacent to site 5. Mr. Piel testified that it is and has been Department policy in reviewing and scrutinizing type A permit applications for the construction of billboards, that the entire *situs* is examined and if there is adjacency of a waterway as to any part of that *situs*, its entirety is deemed to be adjacent; the Department does not view the particular construction locations on the site as separate entities to determine whether a waterway is or is not adjacent to them.

It is apparent that the concept of what is or what is not "adjacent" can reach a point of absurdity: ultimately all wetlands, indeed *all lands*, are adjacent to waterways. There must come a point at which a determination must

be made that certain aspects of wetlands are not adjacent to waterways, although other distant portions of the same particular *situs* abut a waterway. In the matter currently being considered, the *situs* is approximately 20 acres in area. Thus, the issue is whether under the circumstances of this particular tract of land and the abutting Fox Island Creek, the concept of "adjacency" has been properly and reasonably applied.

Under general principles of administrative law where an administrative agency exercises its authority by issuing non-promulgated policy determinations, those determinations although not binding are persuasive in nature. *See,* e.g., *Boller Beverages Inc. v. Davis,* 38 *N.J.* 138 (1962); *Trap Rock Ind. Inc. v. Kohl,* 59 *N.J.* 471 (1971); *Davis, Admin. Law Treatise,* Section 7:13. The persuasiveness of those policy determinations is measured by their reasonableness and fairness in light of the intent, history, and construction of the statutory and regulatory authority under which they are issued. In the matter currently under consideration, it cannot be convincingly argued that the concept of adjacency and the policy under which it is applied to the *situs* at issue is reasonable, at least in respect to sites 1-4. It will be recalled that the distance separating Fox Island Creek from sites 1 through 4, respectively, is 2,530 feet, 1,500 feet, 1,000 feet, and 500 feet. No reasonable interpretation of the word "adjacent" can embrace within it the property in question which at its closest point is 500 feet away from a body of water. This is particularly true when one recognizes that the Department has the authority when it issues a permit to specifically delineate exactly where on the site proposed construction may take place. It can expressly enforce any aspect of its permit so as to protect the waterway

and any area adjacent to it by expressly providing by actual measurement how far billboards or indeed any other structures may be constructed from the waterway.

In my judgment, the concept of adjacency might appropriately be the subject of regulatory definition or a narrower policy expression. Obviously what is or what is not adjacent to a waterway cannot be determined in a vacuum. The definition must achieve a balance in respect to the proposed permissible construction and that aspect of the environment which demands protection. Presumably the concept of adjacency is designed to limit wetlands activity in such a manner and in such a way that the waterways on wetlands and adjacent to them as well as the lands themselves immediately surrounding the waterway are properly protected. An analogous situation is found in the concept of "wetlands buffer," which is defined at *N.J.A.C.* 7:7E-3.27, as "all land within 300 feet of wetlands . . . and within the drainage area of those wetlands. . . ." The policy underlying this provision is as follows:

> (b) Development is prohibited in a Wetlands Buffer unless it can be demonstrated that the proposed development will not have a significant adverse impact and will cause minimum feasible adverse impact, through the use of mitigation where appropriate (1) on the Wetlands, and (2) on the natural exotone between the Wetlands and the surrounding upland. The precise geographic extent of the required actual Wetlands Buffer on a specific site shall be determined on a case-by-case basis using these standards.

The rationale behind the wetlands buffer policy is that developments which are adjacent to wetlands can adversely affect those wetlands through increased runoff, sedimentation, and the introduction into the environment of pollutants.

It would seem that while the concept of a "wetlands buffer" and the concept of "wetlands adjacent to waterways" are not identical, they may both be designed to protect the same aspect of the environment. Thus the 300-foot boundary line that is used to determine a wetlands buffer, might also appropriately be used as a guideline in determining that segment of the wetland deemed to be adjacent to a waterway.

While I have not adopted or accepted this 300-foot distance as a determinative factor, it is a helpful and reasonable guideline. The distances of the billboards in the present matter as measured from Fox Island Creek are far greater than those measuring the wetlands buffer (except for proposed site 5) and in my judgment confirm the view that a determination that sites 1 through 4 are adjacent to a waterway is unreasonable. It was by petitioner's own acknowledgment, however, established that proposed project site 5 is adjacent to Fox Island Creek, and in my judgment such adjacency warrants a determination that the proposed construction in that area contravenes *N.J.A.C.* 7:7A-1.5(a).

Accordingly, I CONCLUDE that in respect to proposed sites 1 through 4, the petitioner has established by a preponderance of the relevant and credible evidence that they are not adjacent to a waterway, and thus do not require water access or a water orientation as a central purpose of the proposed construction. In respect to proposed site 5, I CONCLUDE that it is located adjacent to a waterway, and thus requires water access or a water orientation as its central purpose.

Petitioner's final argument rests on a determination that he has satisfied the third criteria for the issuance of the permit: no prudent or feasible alternate or non-wetlands site is available upon which he may engage in

the construction of the billboards. The only sound evidence upon which this assertion rests is the petitioner's own testimony based upon his knowledge of the general vicinity in which the billboards have been placed. Clearly the issue of what constitutes a prudent or feasible alternative on a non-wetlands site must be placed in its proper context. The general location on which the present billboards have been proposed, Route 72 east of its intersection with the Garden State Parkway, is prime realty in respect to outdoor advertising. It receives the densest road traffic to and from Long Beach Island, is most attractive to potential advertisers, and most profitable to the licensor of the billboard space. I remain unconvinced, however, from the evidence presented by Mr. Bell that no other alternative sites near Route 72 or in other areas in the vicinity of Route 72 in Ocean County exist. While other areas might admittedly be less lucrative to Mr. Bell, he would also be charging a concomitant lower rate for the use of the property upon which the billboards would be constructed.

Moreover, even if no such alternatives were available, in my judgment, there does not have to be an *equivalent* non-wetlands site available which would furnish a comparable economic return in order for there to be an alternative which is prudent or feasible under the Wetlands regulations. *N.J.A.C.* 7:7A-1.5(a)3 does not provide that the alternative non-wetland site be identical to or a commercial equivalent of the site proposed; if an alternative is feasible and prudent, the applicant has failed to meet the established criterion for utilizing the wetlands for that purpose.

Although no construction of the applicable regulation has been found, similar language is contained in 49 *U.S.C.* §1653(f), the Department of Transportation Act of 1960, which states that:

> (f) . . . the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless
>
> (1) *there is no feasible and prudent alternative to the use of such land,* and
>
> (2) such program includes all possible planning to minimize harm to such park, recreation area, wildlife and waterfowl refuge, or historic site resulting from such use. [emphasis added]

The construction of "no feasible and prudent alternative" as used in the foregoing section was discussed by the U.S. Court of Appeals for the Ninth Circuit in *Brooks v. Coleman,* 518 *F.*2d 17 (9th Cir. 1975):

> In its consideration of the Secretary's determination, the trial court drew upon *Overton Park's* definition of "feasible and prudent alternative": parklands may be "used" for highway purposes only if "there are truly unique factors present in the case," if "feasible alternative Routes involve uniquely difficult problems," or if "the cost or community disruption resulting from alternative Routes [reach] extraordinary magnitudes." (*Id.* at 413, 416, 91 S. Ct. at 822.) As a basis for concluding that the Secretary could reasonably have believed that there were no feasible alternatives, the court identified several "truly unusual factors" and "unique problems" that would result.

The *Brooks* construction of the phrase at issue expressly holds that "no feasible and prudent alternatives" should be strictly construed. There *are* feasible and prudent alternatives available to Mr. Bell, notwithstanding the significant portion of Route 72 that has either been condemned by the Department of Transportation or exempted from use as wetlands, and notwithstanding the apparent recent enactment of a municipal ordinance proscribing new billboard construction in Stafford Township. Mr. Bell may, if he chooses, pursue alternative commercial enterprises which do not present "truly unusual factors" or "unique problems." *That they might not be as profitable is neither unique or unusual.* That Mr. Bell might have to construct billboards outside the immediate location of the site is not a disruption of his business which reaches an "extraordinary magnitude."

Moreover, even if *arguendo* the *immediate* parameters of the *situs* provide no alternative locations, it is still arguable that the lack of such alternatives within that vicinity would be sufficient to meet the criteria of the regulation. For example, Mr. Bell acknowledged that on Route 9, an admittedly lesser desirable location, sites might be available although at an excessively higher rental than he feels is appropriate. That does not deem those sites to be non-feasible or imprudent.

In general, particular words of a statute are to be made responsive to the essential principles of the statute. *McMenamy v. Director, Division of Taxation*, 3 *N.J. Tax* 356 (1981). In evaluating the feasibility and prudency of an alternative site for proposed construction other than on wetlands, it is also a legitimate concern of the Department to examine the purpose of that site and

the reasonable relationship which that purpose may have to wetlands, as well as the aesthetics of the proposed construction as it relates to the environment. It is clear that the proposed billboards bear no relationship to wetlands other than that these lands happen to be adjoining a densely traveled road. It is also clear that the presence of billboards must be deemed to be aesthetically displeasing to the environment. In my judgment the overall intent of the regulations as well as the vigorous prevailing policy of the State make these criteria legitimate concerns in evaluating the availability of alternatives. There *are* alternative sites. These sites may not be as desirable to the petitioner; however, the regulations were not designed to create a situation in which an applicant who wants to construct on wetlands might be permitted to do so merely because he has no equivalent alternative that would provide him with the same commercial gain. Indeed, in my judgment, the concept of alternative is so narrow as to perhaps preclude Mr. Bell from even asserting that he has a right to construct billboard advertising for Long Beach Island.

When taken within the context of the general tenor and spirit of the Wetlands Act and the protection afforded by the public policy of the State, the interpretation placed upon this criteria is reasonable and proper. Moreover, I am not unmindful, in evaluating Mr. Bell's assertions concerning the unavailability of appropriate sites, of his conduct in setting in place the various pilings and constructing the various billboards without a permit. Mr. Bell owns approximately 60 billboards; I find it difficult to accept that he was unaware of the permit requirements which are prerequisite to such construction. That he acted in contravention of those requirements did impact upon his credibility and his assertions concerning the purported unavailability of alternative sites.

It must also be borne in mind that the petitioner has no equity or inchoate rights in respect to the construction of the proposed billboards or the additions to the existing billboards, and that he cannot be rewarded because he contravened law and regulation by commencing construction without a permit. Because he has already undertaken work at the site cannot furnish an equitable argument for the legitimization of his efforts. Nor does the fact that several of his billboards pre-exist the Westlands Act and thus may remain undisturbed on the site reinforce his argument concerning construction of new billboards.

Petitioner's legal position may best be appreciated by viewing his proposal as just that—an application to undertake construction which has not yet been initiated for a regulated commercial project, unrelated to wetlands. When viewed in this light, the petitioner's argument reduces itself to one which carries little weight in logic and reason. What he is really saying is that he *desires* to construct billboards on protected wetlands adjacent to Route 72 because that is the most profitable location. Obviously, other less profitable locations exist throughout the general geographical area of the southern Ocean County within which the petitioner operates upon which presumably less profitable billboards may be constructed and advertising space leased. To accept the petitioner's argument would be to accept the argument that anyone claiming that wetlands offer a profitable location upon which a business may be conducted when admittedly other perhaps less profitable non-wetlands locations are also available should be given the opportunity of engaging in a regulated activity. Followed to its conclusion, such argument would make a mockery of the very concept of regulation.

I am convinced that this argument falls well below the standards which the legislature and the Department envisioned when it was provided that in order to permit a regulated activity upon wetlands, one of the criteria which must be satisfied is that no prudent or feasible alternative or non-wetland site be available upon which such activity may be conducted.

Based upon the foregoing, I CONCLUDE that the petitioner has failed to establish by a preponderance of the relevant and credible evidence that no prudent or feasible alternative or non-wetlands site is available upon which he can construct billboards.

I have reviewed in detail the legal and factual arguments upon which the petitioner bases his claim that the Department erred in denying his permit application. I have concluded that in respect to criteria 3 and 4, the petitioner has in fact established compliance; that is, construction of the proposed billboards and additions to the existing billboards will result in minimal feasible alteration or impairment to the natural tidal circulation, natural contour, and natural vegetation of the wetlands. I have also concluded that the petitioner has established that the wetlands site upon which the proposed construction of billboards 1-4 would take place is not adjacent to a waterway.

The primary reason for denying the permit at issue is that there are alternative sites available upon which billboards may be constructed. Indeed, this criteria must not be viewed in a vacuum. In arriving at an appreciation of the meaning of an "alternative site," one must acknowledge the disparity between wetlands and their function within the estuarine system and their use to support commercial billboard activities; one must be mindful of the spirit of the Wetlands Act. One must also

acknowledge the aesthetic qualities that impact upon those billboards and upon the wetlands and the waterway and give credence to the position that Mr. Piel expressed in his testimony that because alternative sites are available, whatever alteration that does occur on the wetlands notwithstanding their *de minimis* character is more than necessary with the broad context of the public policy considerations underlying protection of this environment.

Accordingly, and based upon the foregoing, I CONCLUDE that the petitioner has failed to establish by a preponderance of the relevant and credible evidence that he should be granted a type A permit to engage in the regulated activity of construction of billboards and the additions to existing billboards on wetlands, pursuant to *N.J.A.C.* 7:7A-1.5. It is, therefore, ORDERED that the determination of the Department of Environmental Protection which denied petitioner's permit application be and is hereby SUSTAINED. It is further ORDERED that petitioner undertake forthwith the removal and clean-up activities mandated by the Department at paragraph V of its Summary Report issued on April 4, 1983.

This recommended decision may be affirmed, modified or rejected by the COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION, ROBERT E. HUGHEY, who by law is empowered to make a final decision in this matter. However, if Robert E. Hughey, does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

I hereby FILE my Initial Decision with ROBERT E. HUGHEY for consideration.

June 20, 1984
DATE

STEVEN REBACK
STEVEN C. REBACK, ALJ

Receipt Acknowledged:

6/21/84
DATE

MICHAEL F. CATANIA/dm
DEPARTMENT OF
ENVIRONMENTAL
PROTECTION

Mailed To Parties:

JUN 25 1984
DATE

RONALD I. PARKER/phb
OFFICE OF
ADMINISTRATIVE LAW

Final Decision of the Department of Environmental Protection, State of New Jersey, Dated August 2, 1984

(SEAL)

STATE OF NEW JERSEY

DEPARTMENT OF ENVIRONMENTAL PROTECTION
ROBERT E. HUGHEY, COMISSIONER
CN 402
TRENTON, J.J. 08625
609-292-2885

FINAL DECISION

RE: Wesley Bell t/a
Wes Outdoor Advertising
OAL Docket No. ESA 3531-83
DEP Docket No. 83-26

The Initial Decision in this matter was rendered on June 20, 1984. Exceptions were filed by both parties. In the Departments' exceptions the Deputy Attorney General made a motion to remand the matter to the Office of Administrative Law for the purpose of resolving the issue of the validity of petitioner's municipal building permits for the construction of billboards on the subject property. Having reviewed this matter and the petitioner's response to the exception letter of the Deputy Attorney General, I hereby deny the motion for a remand as unnecessary.

The Administrative Law Judge ordered that the decision of the Department to deny petitioner's wetlands permit application be sustained. The Administrative Law Judge further ordered that petitioner undertake the removal and cleanup mandated by the Department.

Having reviewed the Initial Decision, filed exceptions and file in this matter, I hereby affirm the conclusion and orders rendered by the Administrative Law Judge in the Initial Decision. I accept the Administrative Law Judge's finding and conclusions that petitioner failed to establish by a preponderance of the relevant and credible evidence that no prudent or feasible alternative or non wetlands site is available upon which petitioner can construct billboards. I do not accept petitioner's argument that petitioner has met this test because of the inability to construct such billboards in any other location in Stafford Township nor the restrictions imposed from the Pinelands Comprehensive Management Plan. The prohibitions in these two limited geographic areas do not justify construction of billboards in coastal wetlands.

I do not accept the determination by the Administrative Law Judge that the aesthetics of the billboards has any basis for a determination as to the appropriateness of an issuance of a wetlands permit. The Department must limit its regulatory review to the standards and purposes set forth in the appropriate legislation and must insure that permit applications are decided in conformance with the adopted policy and regulatory requirement as set forth in the Department's rules and regulations for such projects.

Date: 8/2/84

ROBERT E. HUGHEY
ROBERT E. HUGHEY
Commissioner

A100

Letter From Department of Environmental Protection, State of New Jersey, Dated April 29, 1986.

SEAL
STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION
TRENTON

DIVISION OF COASTAL RESOURCES

PLEASE ADDRESS REPLY TO:
CH 401
TRENTON, N.J. (Illegible)

April 29, 1986

Wesley K. Bell
P.O. Box 538-188 Route 72
Manahawkin, NJ 08050

RE: Wetlands Application #82-0255-2
Stafford Township, Ocean County

Dear Mr. Bell:

Enclosed find the application package and $100.00 fee you submitted on 9 April, 1986. This application is being returned because the circumstances presented in this application are not substantially different from the original Wetland Application #82-0255-2 which was denied by the Division on 4 April, 1983 and upheld by the Appellate Division of the Superior Court of New Jersey. There are, therefore, no grounds for the reconsideration of this application.

If you have any questions concerning this letter you may contact Robert Piel of my staff at (609) 292-0062.

Sincerely,

/s JOHN R. WEINGART
John R. Weingart
Director

JRW/RBP/dr
Enclosure
cc: John Sparmo, Bureau of Coastal Enfrocement
& Field Services Dale Lessne, Deputy
Attorney General's Offoce

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A101

Letter From Department of Environmental Protection, State of New Jersey, Dated April 16, 1990.

SEAL
STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION
BUREAU OF ENFORCEMENT

DIVISION OF COASTAL RESOURCES

PLEASE ADDRESS REPLY TO:
1510 Hooper Avenue
Toms River, N.J. 08753
(201) 255-0787

April 16, 1990

Mr. William N. Norton
Administrator, Outdoor Advertising
N.J. Department of Transportation
1035 Parkway Avenue
CN 600
Trenton, NJ 08625

Re: Bureau Files 1530-80-294 and
1530-80-409, Wes Outdoor Advertising,
Route 72, Stafford Township,
Ocean County

Dear Mr. Norton:

This letter is in response to your March 26, 1990 letter concerning application for permit for seven outdoor advertising signs located along a section of Route 72 in Manahawkin, Stafford Township.

My staff has reviewed the material you submitted and has advised me that the location of these signs is mapped, coastal wetlands pursuant to N.J.S.A. 13:9A-1 et seq. A portion of three signs were constructed without the required approval and Notices of Violation were issued. Subsequently, permit applications were denied twice by the Department. The violations remain unresolved and the matter is in litigation.

Accordingly, Wes Outdoor Advertising is required to apply for a Waterfront Development and Wetlands Type A permits for those signs not yet constructed. They must also resolve the existing violations.

If you have any questions, please contact me at (201) 255-0787.

Sincerely,

s/ KATHLEEN M. CANN
Kathleen M. Cann, Chief
Bureau of Enforcement

KMC:JVH:saw

New Jersey is an Equal Opportunity Employer

Relevant Portions of the United States Constitution.

ARTICLE III

* * *

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

* * *

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * *

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

CURRENTS

Billboards Bashed By State; Route 72 Signs Yanked Down

Standing in a driving rain and snow storm, Wes Bell watched on Tuesday as portions of three of his billboards, located just off eastbound Route 72 in Stafford Township, were torn down by the state.

With officials from the New Jersey Department of Environmental Protection, Department of Transportation, Division of Law and the state police on the scene, work crews from IEW Construction Group of Trenton used truck-mounted winches to yank down the so-called backup billboards (facing east toward Long Beach Island). The billboards are located along the south side of the highway between Heron Avenue and the exit to Morris Boulevard.

Bell, president of Wes Outdoor Advertising Co. of Manahawkin, owns numerous billboards in Ocean and Atlantic counties.

Among the advertisements being destroyed was an Internal Revenue Service poster which Bell said is illegal to remove.

The backup billboards are butted against the primary traffic-facing billboards at a 45-degree angle, creating V-shaped billboard formations visible to motorists traveling in both directions along Route 72. The backups were built by Bell after the primary billboards.

"I'm going to win this case. This is a case of taking without compensation."

According to Robert Genatt, deputy attorney general with the state Division of Law, the backup billboards were also built after the state's wetlands laws went into effect, meaning Bell would have needed permits to build — permits he never applied for.

"Prior to the adoption of the state's freshwater wetlands law, he (Bell) came to acquire a number of billboards along that site. After the wetlands law went into effect — because that is a wetlands — he would be required to acquire a wetland permit approval in order to build any kind of a structure in that area," said Genatt. "Without a permit and without approval, he expanded on the billboards."

Shortly after Bell's billboard expansions, the DEP obtained a court order enforcing the law and calling for the backup billboards to be taken down.

Bell was able to get a stay of that order while state and federal courts heard the case. Bell was unsuccessful in his efforts to convince the courts that he should be allowed to keep the backups, and the state succeeded in having the stay dissolved.

"There is currently no stay, so the order (to take down the backups) is fully enforceable. So that's the action that was taking place today, carrying out the court's order," said Genatt.

To carry out the removal of the signs, the DOT was used since the DEP has no engineering capacities. According to Ralph Ballunas from the DOT's Bureau of Maintenance Engineering, the work was contracted out. He and other DOT representatives were on hand at the site to make sure the job was done properly.

The primary billboards, facing west, were left intact. The state considers those billboards legal, since they were built prior to the wetlands laws.

Bell said the backup billboard spaces were being donated to the likes of the U.S. Army and Navy, the Internal Revenue Service and the Coast Guard Auxiliary. The primary billboards facing the highway are "for paying customers," he said, adding, "I make nothing on the (backup) billboards."

Bell defended the backup billboards, saying they were not environmentally deleterious.

Despite the definitive action taken by the state on Tuesday, Bell said his fight is far from over. The case is now in the Appellate Division, where he hopes to recoup loses.

As the destruction work was being completed Tuesday, Bell vowed to sue the state for $3 million, the amount Bell said he could make if allowed to keep the backup billboards on that property.

"They're on my property, destroying my property," he said. "They're going to have to pay damages."

Bell said the state's taking down his backup billboards has deprived him of the use of his property, a taking of his property without adequate compensation, and believes his claim is supported by a recent precedent-setting decision favoring a Loveladies developer who was awarded more than $2.5 million (plus interest) after the state blocked his efforts to build on land it deemed wetlands.

"I'm going to win this case. This is a case of taking without compensation," said Bell, who plans to represent himself. "I know enough about this to handle it myself," he said.

Genatt disagreed with Bell's precedent. "We're familiar with the Loveladies case. It's a pretty well-known case, and certainly the position we're going to take is that case is quite a different situation."

Bell likely would have preferred a different situation on Tuesday. Shortly after he pulled up to the site where his backup billboards were being torn down, state police summonsed him for careless driving for entering a zone marked by police cones. He was also cited for various violations regarding vehicle inspection and registration. "This is just harassment," he said of the summonses.

— Jay Mann

Photographs by Patti Kelly

***ANY QUESTIONS?:** There was little opportunity for billboard owner Wes Bell to question the actions of the state as officials came on Tuesday and literally yanked down his backup billboards on Route 72 in Manahawkin. The backup billboards were illegally built on wetlands, according to the Department of Environmental Protection.*

***FEELING DOWN:** Bell gets photographic evidence of the state-ordered dismantling of his backup billboards on Tuesday. Bell, who failed in a legal effort to keep the billboards, intends to sue the state for $3 million.*

Town Hall Pieces on Auction Block, Chopping Block

Demolition Set for May 1

As its first official function since its dedication, the new Long Beach Township Municipal Complex hosted a meeting where commissioners discussed tearing down the old town hall.

Demolition of the 57-year-old building, facing Long Beach Boulevard at 68th Street, will start May 1.

A bond ordinance was passed providing funds for the demolition of the building, grading and leveling of the ground and construction of a Bayview Park extension and gazebo.

A $150,000 Green Acres loan at 2 percent interest has been approved to reimburse the township for the work, Commissioner Frank T. Pescatore said.

An auction on Thursday, April 18 at the old municipal building will give the public a crack at usable doors, windows, electrical fixtures, office equipment and other remnants of the old building. The walk-through will be from 9 a.m. to 10 a.m. and the auction will begin at 10.

In other business, a resolution was passed urging Gov. Whitman and the Legislature to maintain the state P.A.A.D. prescription plan coverage for all senior citizens. Currently there is a consideration to eliminate from the plan senior citizens with liquid assets greater than $50,000. This would affect 30,000 Ocean County senior citizens, said Mayor James J. Mancini, who is also an Ocean County freeholder.

Other matters addressed were the handicap access ramps being installed on township streets, replacement of water lines, and roadwork.

Using 1995 Community Development Block Grant funds, five ramps will be constructed in Brant Beach. With 1996 funds forthcoming, five ramps will be built in Holgate.

Currently, the township is replacing water lines. Every year five lines are replaced in an ongoing plan to upgrade water pressure. The township is also beginning overlay work on some roads with monies provided by the state Department of Transportation. Potholes will be resurfaced with $8,000 provided by the state.

The next board of commissioners meeting will be held Friday, April 19.

— Sue Wessel

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